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**POLITICIZATION OF INTERNATIONAL CRIMINAL  
INTERVENTIONS AND THE IMPASSE OF TRANSITIONAL  
JUSTICE: A COMPARATIVE STUDY OF UGANDA AND  
KENYA.**

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**A thesis submitted in fulfilment of the requirements of the degree of Doctor  
of Philosophy in Politics and International Studies**

**The University of Warwick, Department of Politics and International Studies**

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### **Abbreviations and definition of local terms**

ACJHR	African Court of Justice and Human Rights
ADB	African Development Bank
ADF	Allied Democratic Forces
AG	Attorney General
ANC	African National Congress
ASP	Assembly of State Parties
AU	African Union
BBC	British Broadcasting Corporation
BIA	Bilateral Immunity Agreements
BIEA	British Institute in Eastern Africa
CAR	Central African Republic
CBR	Centre for Basic Research
CICC	Coalition for the International Criminal Court
CIPEV	Commission of Inquiry into the Post-Election Violence
CIVHR	Commission of Inquiry into Violation of Human Rights
CNDD-FDD	Defence of Democracy- Forces for the Defence of Democracy
CORD	Coalition for Reforms and Democracy
CPA	Comprehensive Peace Agreement
CSO	Civil Society Organization
CSO	Civil Society Organization

DP	Democratic Party
DPP	Director of Public Prosecutions
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECK	Electoral Commission of Kenya
EU	European Union
FDC	Forum for Democratic Change
FIDH	International Federation for Human Rights
FORD-K	Forum for the Restoration of Democracy – Kenya
GJLOS	Governance, Justice, Law and Order Sector
GoU	Government of Uganda
HSMF	Holy Spirit Mobile Forces
HURIPEC	Human Rights and Peace Center
ICC	International Criminal Court
ICD	International Crimes Division
ICJ	International Criminal Justice
ICL	International Criminal Law
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Person



IEBC	Independent Electoral and Boundaries Commission
IGAD	Intergovernmental Authority on Development
JLOS	Justice, Law and Order Sector
JSC	Judicial Service Commission
KANU	Kenya Africa National Union
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
KPTJ	Kenyans for Peace with Truth and Justice
KTN	Kenya Television Network
LIGA	Liu Institute for Global Affairs
LRA	Lord's Resistance Army
LSK	Law Society of Kenya
MONUSCO	Mission de l'Organisation des Nations Unies en République démocratique du Congo
MP	Member of Parliament
NARC	National Rainbow Coalition
NASA	National Super Alliance
NCIC	National Cohesion and Integration Commission
NEPAD	New Partnership for Africa's Development.
NGO	Non-Governmental Organization

NRA/M	National Resistance Army/Movement
ODI	Overseas Development Institute
ODM	Orange Democratic Movement
OHCHR	Office for the High Commissioner for Human Rights
OPVV	Office of Public Counsel for Victims (OPCV)
OTP	Office of the Prosecutor
P-5	Permanent 5
PEV	Post Elections Violence
PNU	Party of National Unity
PSCU	Presidential Strategic Communication Unit
RLP	Refugee Law Project
SCSL	Special Court for Sierra Leone
SG	Solicitor General
SGBV	Sexual and Gender Based Violence
SPLA/M	Sudan People Liberation Army/Movement
STL	Special Tribunal for Lebanon
TFV	Trust Funds for Victims
TGoNU	Transitional Government of National Unity
TJ	Transitional Justice
TJRC	Truth, Justice and Reconciliation Commission
TNA	The National Alliance

TNA	The National Alliance
UK	United Kingdom
UN	United Nations
UNECA	United Nations Economic Commission for Africa
UNGA	United Nations General Assembly
UNLA	Uganda National Liberation Army
UNMISS	United Nations Mission in South Sudan
UNRF	Uganda National Rescue Front
UNSC	United Nations Security Council
UPC	United People's Congress
UPDA	Uganda People's Democratic Army
UPDF	Uganda People's Defence Forces
UPM	Uganda People's Movement
URP	United Republican Party
USA	United States of America
VPRS	Victims Participation and Reparations Section
WCD	War Crimes Division
WNBF	West Nile Bank Front
WPA	Witness Protection Agency

### Definition of terms

<i>Gomo Ton'g</i>	A form of Acholi traditional justice (bending a spear).
<i>Kon'go</i>	Acholi traditional brew.
<i>Madoa doa</i>	Swahili corded word for unwanted people.
<i>Majimboism</i>	Swahili word for regionalism.
<i>Mato Oput</i>	A form of Acholi traditional justice (drinking the <i>Oput</i> tree)
<i>Mau Mau</i>	Kenya freedom movement that fought British colonialism.
<i>Mzungu</i>	Swahili word for white man.
<i>Nyayoism</i>	Loosely translated as following footsteps.
<i>Nyono Ton'g Gweno</i>	A form of Acholi traditional justice (stepping on an egg)
<i>Pakalast</i>	Uganda's political parlance for Museveni's longevity in power.

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Academy's generous consideration and the interactions I had on the subject matters of international criminal law and transitional justice.

In the Netherlands, Uganda and Kenya, I was also lucky to associate with several institutions and individuals, some of whom were my interview partners, hosts and local interlocutors. I appreciate the help I received from everyone in conducting interviews in The Hague, Gulu and Kampala in Uganda, and Nairobi, Kisumu, Eldoret, Nakuru and Kiambu, in Kenya. In Kampala, I was hosted by the Center for Basic Research (CBR) whose hospitality was instrumental in my stay in Uganda. I also thank my larger extended family and friends in Kenya, as well as friends in the UK for their unwavering support and hospitality.

**Map 1: Uganda**



Source: The University of Texas at Austin, Perry-Castañeda Library Map Collection

Map 2: Kenya




Source: The University of Texas at Austin, Perry-Castañeda Library Map Collection.



## **Declaration**

I hereby declare that the content of this thesis is solely the product of my scholarly work and has not been presented for examination at any other institution. However, some parts of chapter three and four have been published as an article in the 2017 special issue of the International Journal of Transitional Justice. I submitted the article “Counter-shaming the International Criminal Court’s Interventions as Neo-colonial: Lessons from Kenya,” for publication in July 2017, after which it was accepted and published.

Signature: 

Date: 16.05. 2018.

## **Abstract**

Since the International Criminal Court's (ICC) establishment in 2002, its interventions in African situations have produced a mix of results. Whereas many observers have hailed the ICC's forays onto the continent for expanding the avenues of justice for mass atrocities, there are also political connotations to some of its interventions, as evidenced in narratives of selectivity and neo-colonialism. Building on the latter impacts of the Court's interventions in Africa, this thesis seeks to discern the shape of local/regional uptake of international criminal justice (ICJ). This follows from contrasting the ICC's qualification as a moral agent in the global war on impunity for international crimes, with domestic political translations of the Court's interventions and subsequent collective action at local and regional levels. Thus, the principal argument from this thesis is that contextual normative adaptations produce global-local exchanges that result in viable conditions under which the ICC's interventions are politicized, to the detriment of its investigative activities and legacy in situation countries. More specifically, elite level exchanges in sub-national, national, regional and international realms produce blends of local and global realities, resulting into the ICC's exposure to politicization. These findings are instructive for wider debates on the subtle ways in which the ICC is undermined (rather than outright defiance), with spiralling effects on long term peace-building and other regional contexts.

In discerning the aforementioned conclusions, I asked the simple research questions: (1) why and how is an ostensibly international legal response to heinous crimes susceptible to (mis)appropriation and subversion by domestic political elites? (2) what are the far-reaching consequences of politicizing the ICC's interventions on creating conditions for lasting peace in fragile societies? Given the duality of the ICC's politicization – through (mis)appropriation and subversion, the thesis adopted a comparative study of Uganda and Kenya, which exemplify the two forms of domestic translations of ICJ. The thesis employed a qualitative methodological approach that drew upon secondary data sources, as well as primary data collected through personal key informant interviews in the Netherlands, Uganda and Kenya, with ICC officials, politicians, government officials, representatives of local and international organizations and affected communities. Some of the secondary data sources include: journal articles, media reports, government documents, books, online sources, legal instruments, the ICC's documents and official speeches. The data collected was analyzed through grounded theory, in which evidence collected raised new sub-questions for further interrogation. All available evidence was then triangulated to develop a critical analysis of the research questions posed. Conceptually, I built on three interrelated concepts (the ICC's projection of a moral universe, the narrative lens and spatial hierarchies) to discern the ICJ norm diffusion in local/regional contexts.

The thesis concludes that the various forms of political resistance to the ICC have pernicious effects on peace-building beyond national boundaries. Perhaps, a greater degree of the Court's acceptance will be driven by its proactive steps towards the universality of justice, whose absence partly informed the construction of narratives on some of its foremost interventions in Africa.

## **Introduction**

### **The International Criminal Court in retrospect**

The commencement of this thesis towards the end of 2014 coincided with the International Criminal Courts' (ICC) active interventions in African countries, namely: Uganda, the Democratic Republic of the Congo (DRC), Sudan, the Central African Republic (CAR), Kenya, Libya, Côte d'Ivoire and Mali. The thesis was therefore timely, given that I was able to closely monitor various perceptions on the Court as they unfolded in international, regional and local realms.

Notably, the ICC's interventions in Africa attracted various sets of views that oscillated between acceptance and resistance. On the one hand, acceptance was often justified by arguments that the ICC expanded the avenues of justice for international crimes in a continent that had a long history of impunity (Brima 2014; African Group for Justice and Accountability, 2016; Annan, 2016). On the other hand, indications of the Court's resistance included the construction of narratives on some of its interventions as selective and neo-colonial.

Narratives are critical entry points in assessing the shape of the ICC's reception in local and regional contexts, owing to their utility in producing, transforming and contesting meanings (Riedke and Rottenburg 2016, 5). The narrative lens derives its significance from its ontological orientation, as well as its ability to derive meaning of the world around us and make sense of political realities (ibid). Narratives also incorporate "material inscriptions and constitutive influence of material and non-human actors" (ibid, 6). In other words, they enable us to track the constitution of agency and

configure power relations against the backdrop of competing interpretations of reality (ibid, 11).

Political narratives are defined by four interrelated dimensions – performance, political rule, power and authority, and plot (ibid, 10). In this regard, narratives perform critical roles in political communication and constituting political rule because of their salience on “(de) legitimating rule-based relations” (ibid, 10). Narratives also entail authoritative discourses, multiplicity of interpretations and processes of establishment (ibid, 10). In the plot dimension, narratives feature in shaping, producing and diffusing politicized knowledge, as well as triggering collective sentiments by bringing together various elements into a significant whole.

Besides their orchestration by political elites, the narratives on the ICC’s interventions in some of the African situations gained traction amongst some critical constituencies in local and regional realms. Unlike in the international arena where justice was seen to be done, some affected communities, victim groups and regional actors shared in the narrations of some of the Court’s interventions as selective or neo-colonial. In so doing, the narratives partly shaped domestic/ regional uptake of ICJ, and by extension, contributed to the ICC’s legacies on the continent. As such, Stahn (2012, 275) rightly attributed the legacies of international criminal tribunals to external judgements and incremental progression, as opposed to unilateral construction.

More significantly, the narratives on the ICC’s interventions were interconnected with domestic political struggles. In other words, the Court’s connotations with selectivity and neo-colonialism were orchestrated by political elites in their endeavours to settle

political scores, gain legitimacy, and ultimately influence the nurture of their respective post-conflict transitions.

To illustrate, the ICC's accusations of selectivity were prevalent in situations whereby the Court was invited by similarly liable domestic authorities to investigate their military or political opponents (Branch, 2007; Clarke, 2008; Peskin, 2008). On this note, Uganda's and the DRC's situations followed state referral of insurgents to the ICC in January and June 2004, respectively (ICC, 2017a). In a similar vein, the ICC intervened in Côte d'Ivoire in 2011 under its *proprio motu* provision (own motion), after the President reconfirmed the country's acceptance of the Court's jurisdiction in December 2010 and May 2011 (ibid). Côte d'Ivoire had initially accepted the ICC's jurisdiction in 2003 but was yet to ratify the Rome Statute (ibid).

The Ugandan situation arose from the protracted northern conflict between the National Resistance Movement (NRM) regime and the Lord's Resistance Army (LRA) insurgency. Based, at least in part, on perceived marginalization of the north and poor governance, the LRA expressed its desire to overthrow the NRM and establish a theocracy (Titeca, 2010; Refugee Law Project, 2014). As a result, the Government of Uganda (GoU) employed a combination of military offensives and peace overtures to end the war. The ICC was subsequently enlisted in the NRM's goals of ending the war with the insurgents' annihilation.

Besides the Ugandan, the DRC and Côte d'Ivoirean experiences, the ICC was also accused of fostering neo-colonialism in Africa. This precedent followed the UNSC's referrals of Sudan and Libya to the ICC, and the Court's *proprio motu* intervention in Kenya. Triggered by some of the affected political elites, the neo-colonial narrative

galvanized their domestic support base and aroused the Pan-African spirit of safeguarding the continent's territorial integrity and dignity of the African people.

For example, during a political rally in Darfur in 2009, the ICC indicted Sudanese President, Omar al Bashir, interpreted the Court's intervention as Western neo-colonialism and an effort to undermine the country's sovereignty and peace (Xinhua 2009, 1). In turn, some politicians and members of mass organizations spoke against the ICC and chanted "Down, down ICC!" and "Down, down Ocampo!" (ibid, 1).

Similarly, some Libyan officials rejected the ICC's jurisdiction after the indictment of Muammar Gaddafi (former president), his son Saif al-Islam Gaddafi, and former intelligence chief, Abdullah al-Senussi. The officials argued that the ICC "had a vendetta against African states" (Chulov, 2011), and was "overly preoccupied with pursuing African leaders" (BBC 2011,1).

The neo-colonial narrative gained unprecedented momentum with the ICC's intervention in Kenya's 2007/2008 post-election violence (PEV). Two of Kenya's accused – Uhuru Kenyatta and William Ruto – formed a new political alliance under which they counter-shamed the Court's intervention as neo-colonial. In the run-up to the 2013 elections, they formed the Jubilee Alliance, as a coalition of Kenyatta's The National Alliance (TNA) party, Ruto's United Republican Party (URP) and their respective Kikuyu and Kalenjin communities (Lynch and Rozej, 2013; Lynch, 2014; Mueller, 2014). Despite their ICC cases, and in part because of them, they won the March 2013 elections, after which they formed a government and continued to propagate the neo-colonial narrative in national and regional platforms.

Due to the linkages between ICJ and transitional justice (TJ) as roadmaps to liberal peace, this thesis simultaneously discusses the grounds for, and impacts of the narratives in shaping the courses of the ICC's processes and TJ discourses. In so doing, the thesis draws on a comparative study of Uganda and Kenya to discern the conditions under which the ICC's interventions are potentially politicized in local contexts and resulting implications for TJ mechanisms. The thesis goes further to deduce the implications of the Ugandan and Kenyan experiences to other regional contexts – the DRC, Côte d'Ivoire, South Sudan and Burundi. These broad objectives informed the framing of this thesis' underlying and subsidiary research questions.

### **Research Questions**

The fact that the ICC's interventions are not immune to politicization in domestic spaces by some of the accused or potential suspects begs several questions. This concern is particularly significant, given that politicization of the Court's interventions undermines both its capacity to successfully conduct cases, and the international community's aspirations towards zero tolerance on impunity for serious crimes.

Thus, this thesis seeks to answer the underlying research question: why and how is an ostensibly international legal response to heinous crimes susceptible to (mis)appropriation and subversion by domestic political elites? This primary research question leads to avenues of exploring some of the reasons for and the modalities of politicizing the ICC's intervention, as observed in the Ugandan and Kenyan situations.

With regard to the *why* question, this thesis explores conditions under which the ICC's interventions were potentially politicized in Uganda and Kenya, with lessons for other regional contexts. Towards this end, the thesis analyzes actor and institutional

interactions on the Court's interventions across local, regional and international spaces. In so doing, points of convergence and divergence within spatial hierarchies are assessed in equal measure. This leads to a contrast of the normative foundations of international criminal interventions vis-à-vis the ICC's confrontations with local and regional realities.

The underlying research question also triggers an explanation of *how* the ICCs interventions were recast in the situations under study. Precisely, the question leads to an elaboration of the mechanisms under which the Court's interventions were embedded within everyday politics and subsequent immersion in domestic political struggles.

Moreover, the contemporaneous nature of ICJ and TJ discourses guided the construction of this thesis' subsidiary research question, namely; what are the far-reaching consequences of politicizing the ICC's interventions on creating conditions for lasting peace in fragile societies? Within the parameters of this question, this thesis assesses the resulting implications of the narratives on the ICC's interventions for TJ in local spaces, and by extension, on other regional contexts. The question also provides the latitude for assessing state cooperation with the ICC in implementing the principle of complementarity as an additional effort towards liberal peace-building.

By answering these research questions, which have received relatively little attention in the existing scholarship, this thesis offers significant contributions to the literature on the ICC, TJ and the Ugandan and Kenyan politics. Therefore, the findings in this thesis are significant in the disciplines of law and political science. On the one hand, the thesis intersects with aspects of the utility of international criminal law (ICL) for



conflict management, normative challenges for ICL in deeply divided societies, and the transferability of the ICC's principles to local spaces. On the other hand, the research confronts the practical political problems the Court faces in situation countries, such as struggles for cooperation, domestic political translations, and challenges to its authority and legitimacy in the politics of transitions.

### **Specific contributions to the literature**

Over the years, there has been a remarkable attention in the scholarship to politicization of the ICC's interventions in Africa (for example Branch, 2007; Clarke, 2008; Knoops and Zwart, 2013; Burbidge, 2014; Lynch and Rozej, 2014; Lynch, 2014; Mueller, 2014; Kagwanja, 2015; Wolfe, 2015). Some ground has also been covered on the interaction between the ICC or international criminal tribunals and local/regional contexts (Peskin, 2008; Peskin, 2009; Hoile, 2014; Stahn, 2015; Boehme, 2017). This thesis engages with and builds on this literature to make multiple contributions to the fields of political science and law.

First, this thesis, to my knowledge, is among the first to concurrently explore politicization of the ICC's interventions and resulting implications for transitional justice (TJ) or long-term peace-building. This includes attention to case specific examples – Uganda and Kenya – and an extrapolation of their precedents to other regional contexts, namely: the DRC, Côte d'Ivoire, South Sudan and Burundi.

Second, the aforementioned literature mainly consists of single country study analyses. This thesis closes this gap by adopting cross-case comparisons. Whereas single case studies have invaluable relevance in exploring case specific details and generating hypothesis (Oskar et.al. 2010), the comparative approach enables us to detect both

convergence and variation (Azarian 2011, 118). In addition, the comparative method is useful in drawing useful insights on causality for the discovered similarities and differences, hence the development of a causal theory that can elucidate cases under study (ibid, 119). Also, comparative studies have a “general reflexive function” - they widen our scope, broaden our insight and enable us to see things in perspective (ibid, 117).

Third, the thesis is amongst the first to analyze the ICC’s interventions within spatial hierarchies of the local, regional and international realms. This thesis partly departs from the existing scholarship (Peskin, 2008; Peskin, 2009; Stahn, 2015; Boehme, 2017) that centres on the interaction between the ICC or international criminal tribunals and local/regional contexts. While the aforementioned multi-level analyses build from the top (the international versus national or regional spheres), my analysis builds from the bottom upwards.

Towards this end, the thesis contrasts normative dispositions on ICJ within the national (sub-national spaces), and between the national/regional and the international realms. Building on Peskin’s (2008) illustration of power struggles between the ICC and states, I go further and analyze elite level exchanges and their reconfiguration of cooperation amongst targeted audiences within the spatial hierarchies. In so doing, thesis offers novel insights on the role of varying power positions on the ICC’s politicization and legitimation.

Overall, this thesis highlights the salience of the narratives on the ICC’s interventions, and their negations of the foundational aspirations of the Rome Statute and the Court’s positionality as a last resort. Equally put in jeopardy is the vision of the international

community in constructing a moral universe where international crimes do not go unpunished.

More concretely, the principal argument in this thesis is that contextual normative adaptations produce global-local exchanges which result in viable conditions under which the ICC's interventions are politicized, to the detriment of its investigative activities and legacy in situation countries. In other words, elite level exchanges in sub-national, national, regional and international realms produce blends of local and global realities, which lead to the Court's exposure to politicization. These findings are instructive for wider debates on the subtle ways in which the ICC is undermined (rather than outright defiance), with spiralling effects on long term peace-building and other regional contexts.

The aforementioned arguments were preceded by a considered research design, besides an appropriate methodological and conceptual choice that incorporated the roles, goals and power positions of most actors and institutions in ICJ and TJ. These approaches enabled a rigorous analysis of actors and institutional interactions (on ICJ and TJ) at the local, regional and international levels, and the diffusion of the global norm of ICJ across time and space.

### **Conceptual and methodological choices**

This thesis' analysis of politicization of the ICC's interventions and resulting implications for TJ built on three related concepts. These include (1) the ICC's projection of a moral universe, (2) narratives on the ICC's interventions, and (3) spatial hierarchies or post-conflict spaces (local, regional and international realms).

The idea of a moral universe stems from the ICC's futuristic vision of combating impunity for international crimes, with the ultimate aim of creating a safer world. In order for this dream to be realized, concrete steps have to be taken as stipulated in the Rome Statute. These range from the preamble's recollections of unimaginable suffering of millions of children, men and women during atrocities, affirmations of zero tolerance to impunity for international crimes, and calls for national efforts and international cooperation in prosecutions. To these ends, the ICC positions itself as a Court of last resort by its formation as complementary to national institutions.

Before the ICC's establishment, it was argued that there was a missing link in the international legal regime (UN, 1998). As such, it was recalled that the International Court of Justice's jurisdiction is limited to conflicts between states, and *ad hoc* international criminal tribunals were only applicable to case specific contexts (ibid). Therefore, the ICC's creation filled the international systems' void in paying attention to individual criminal accountability on the commission of mass atrocities across multiple contexts.

Nonetheless, the ICC's expression of a moral universe is also contested or shaped by political actors who also think of themselves as ethical actors. Such was the case with some of Uganda's and Kenya's political elites who orchestrated narratives on the ICC's interventions as selective or neo-colonial. Therefore, the narrative lens is useful in assessing forms of resistance to the ICC's normative imperatives in domestic/regional spaces, and their ensuing effects on TJ discourses.

Closely linked to domestic contestations of the ICC's goal of a moral universe is the concept of post-conflict spaces or spatial hierarchies. As Heathershaw and Lambach

(2008) argue, post-conflict spaces are best understood as fields of power that are constantly negotiated and contested amongst global, elite and local actors. In other words, post-conflict spaces are empirical reflections of authorities that emerge during, and after episodes of political violence or civil war (ibid). The scholars frame post-conflict societies into three layers of space: local (subordinates); elite (local, national and regional authorities); and the global/international sphere. However, I reconstitute the levels of hierarchies as; local, regional and international spaces. I deliberately omit the elite level, as these actors are included in all the three levels of analysis.

In the reorganized spatial hierarchies, the international space encompasses the UNSC, owing to its leadership roles in some of the ICC's activities, and Chapter VII of the UN Charter on maintaining international peace and security. Whereas regional spaces portend as elite solidarity spheres due to their collective approach to global issues, local spaces emerge as contested sovereignties, with a multiplicity of interest groups that lay claim to legitimacy and authority.

Given that the ICC's interventions involve the interaction of multiple actors and institutions (at the international, regional and local levels), I contend that the reconstituted spaces do not exist in isolation, but exhibit overlaps and constant linkages. This interpretation also links to Heathershaw and Lambach's (2008, 10) arguments on the intersection of spaces (or selves), which results into hybridity and production of multiple spaces under conditions of hegemony.

The inclusion of spatial hierarchies in this thesis' conceptual framework escapes the dangers of analysing the state as a unitary actor, which Heathershaw and Lambach (2008, 14) argue is an analytical misstep. As such, the single sovereign view point

obfuscates the numerous forms of ‘state’ during international interventions. Seen from this angle, viewing the state as a unitary actor assumes its individuality, and fails to assess the subversion, appropriation and resistance to international strategies in local contexts. (ibid, 7). Moreover, the single sovereign standpoint oversimplifies conceptual dichotomies, while attention to spatial hierarchies captures the complexities in hybrid forms of governance (ibid, 14).

In turn, this thesis’ analysis of the ICC’s interventions beyond the state level fits within a new shift in direction of the TJ scholarship. As documented in the 2017 special issue of the *International Journal of Transitional Justice*, the literature is tilting towards “beyond borders as the new the architecture of TJ.” In the journal’s editorial note, it is posited that the increasing significance of transnational non-state actors and international criminal interventions in many conflicts call for challenges to the state as the first call of contemplating on, and designing TJ mechanism (Hazan 2017, 1). Further, the nation state, which used to be the basis for international relations and TJ, is challenged by: neoliberalism, diffusion of information technologies across communities, and the increasing influence of multinationals (ibid).

Broadly speaking, the three conceptual frameworks are useful in this this thesis because of their specific functions and relations to one another. Whereas the concept of a moral universe expresses the ICC’s vision of guaranteeing human security, the narrative lens offers empirical evidence to the ICC’s resistance, and the frame of spatial hierarchies maps out power relations amongst diverse actors and institutions in the ICJ enterprise. Taken together, the three concepts elucidate complexities and linkages that predispose the ICC to politicization in domestic contexts.

Besides the adoption of the three interlinked conceptual frames, this thesis is also a deeply empirical study, which also counts as one of its strengths. Primarily, this thesis contrasts popular perceptions on the ICC at the international level with local/regional perspectives and realities. In so doing, I evaluated secondary literature and other documents as the research unfolded, in addition to collecting primary data through qualitative interviews.

Data collection unfolded as follows. It began at The Hague, the Netherlands, in July 2015, where I interviewed an ICC official, journalists reporting on the ICC, and some representatives of the Coalition for the International Criminal Court (CICC). This was followed by additional interviews in Kenya and Uganda, from August 2015 to May 2016. In both countries, the selected interview locations included members of communities affected by the conflicts and thus by the ICC's interventions (Gulu in Uganda; and Kiambu, Nakuru, Eldoret and Kisumu in Kenya). Some of the interviews were also conducted in Kampala, Uganda, and Nairobi, Kenya, with government representatives, ICC officials, governance and human rights activists and members of affected communities.

Before conducting the interviews, I consulted secondary sources from research institutions, non-governmental organizations (NGOs) and media organizations. For these tasks, I recruited a Research Assistant in Kenya (with funding from the BIEA) who mapped the relevant literature and potential interview partners. In Uganda, I was affiliated to the CBR, whose archives and occasional seminars were useful in understanding the country's political contexts and the northern conflict.

During primary data collection, I conducted over 80 personal in-depth interviews with key informants in the Netherlands, Uganda and Kenya. Most of the interviews were conducted in English, although in some instances, I used a combination of English and Swahili for clarity from some of the respondents.

In selecting most of my interview partners, I employed non-probability sampling. According to Ritchie et.al. (2003, 78) this approach involves the deliberate selection of units, in order to reflect distinct characteristics of groups in the sampled populations. Specifically, I adopted purposive sampling, which is a subset of non-probability sampling. The sampling technique takes into account unique experiences and socio-demographic features, thus allowing exhaustive examinations of key issues to be studied (Ritchie et.al. 2003, 78). In this case, I selected heads of institutions or individuals who were directly involved with Uganda's and Kenya's ICC cases, such as: opinion leaders, religious leaders, the youth, ICC officials, political elites and other relevant stakeholders.

After identifying some key informants, I used the snowballing technique to map some other critical actors, some of whom responded in the affirmative for interviews. The technique was specifically useful in this particular study, because of the confidential nature of most people associated with conflict scenarios. These included: victims and perpetrators, ICC officials, political elites, governance and human rights activists, as well as government officials. Indeed, and as Atkinson and Flint (2001, 1) have suggested, snowballing is useful amongst more impermeable segments of society.

In conducting the interviews, I used semi-structured interview guides which were useful in asking open-ended questions and probing for clarity. Semi-structured or in-



depth interviewing is generally flexible and can provide room for changing the order of asking questions, or their phrasing (Arthur and Nazroo, 2003, 111). This approach was valuable in controlling the interviewing process, as well as sequencing the relevant questions. Each actor and institutional category was asked separate sets of questions, depending on their roles and interactions with the ICC and TJ processes in the countries under study.

The primary data collected was then analyzed through a grounded theory approach where evidence collected raised new sub-questions for further investigations. For example, during data collection and analysis, there was a recurrent theme of mixed perceptions on the ICC's resistance and acceptance in equal measure, which called for further interrogation and rigorous analysis. Essential to grounded theory is concurrent data collection and analysis, as opposed to other methodologies where data is first collected or theoretical positions are constructed and the data analyzed later (Birks and Mills, 2011). Within this approach therefore, I consistently analyzed the primary data collected and drew themes as they emerged.

I also triangulated primary data with additional secondary sources that I continuously evaluated. Triangulation is a useful methodology for data analysis owing to its corroboration and validation of evidence (Jick, 1979). Some of the secondary sources evaluated were government and non-governmental reports, the ICC's judgements and media briefings, legal instruments, media sources, blogs, journal articles, books, survey data and working papers. During triangulation of primary and secondary sources, my analysis changed over time as new themes emerged.

The entire primary data collection process was guided by University of Warwick's research ethics policy. The policy calls for the integrity and well-being of people involved in the research and the wider community. In order to safeguard the integrity of the research project, I sought written or oral permissions from authorities, as well as from my interview partners. From the authorities, I obtained formal consent through submitting the requisite permit forms and paying research fees. With regards to interviewees, I sought written consent, or verbal permission in case this was not possible.

Due to the potential risks in conducting research on the ICC, and in conflict societies, I opted for elite interviewing as a trade-off between research do-ability and ethics, excellence, avoidance of harm, and integrity. To further ensure the safety of all involved, the interview locations (offices, restaurants, coffee shops) were selected by the interviewees. I also promised all the interviewees anonymity, with specific references to their roles – such as government official, political activist, religious leader, elder or youth – instead of mentioning their actual names. I also gave assurances on data protection, which I followed through password protection and non-closure of interview partners and their responses. The primary data was recorded, then transcribed and analyzed through manual coding. All the data will be stored for a period of five years, after which it will be deleted.

Besides the standardized regulations, I also took into account my positionality as a researcher in shaping and planning field work, as well as data analysis. Given more familiarity with the Kenyan context (as a citizen), I chose to conduct interviews in the country as I reached out to potential interview partners in Uganda. This was followed

by back and forth interviews in the two countries, which was also useful for the comparative nature of this research.

Nonetheless, my positionality as a Kenyan from a community other than those that were under the ICC's investigations raised additional issues. Cognizant of this dilemma, and to minimize the risks of biases, the research followed pre-designed interview guides, while I regularly reflected on the data collected. Specifically, this approach entailed the use of interview guides as the basis for asking questions and verifying the credibility and appropriateness of responses.

The comparative aspect of this research also addressed the risks of biases, as data analysis entailed overarching themes on the ICC's reception in Uganda and Kenya. Some of the thesis arguments were also subjected to periodic review by my supervisors, and in some outlets where I presented some of the findings, such as a conference presentation in Nairobi in October 2015, and a journal submission in July 2017.

There were also differences in conducting field work in Uganda and Kenya as a result of the contrasting political conflicts. Whereas Kenya's 2007/2008 political crisis was widespread across the country, Uganda's conflict was concentrated in the northern region and spread to neighbouring countries (the DRC, CAR and South Sudan). Thus, I conducted interviews in more locations on the Kenyan conflict than Uganda's – an eventuality that was compounded by inability to travel to the DRC, CAR and South Sudan because of logistical and time constraints. The disparities in the total interviews conducted between the two cases did not affect data analysis, as this thesis relied on multiple sources (both primary and secondary).

Certainly, conducting interviews in Kenya was more difficult because of the ways in which the ICC's intervention had been politicized. Unlike in Uganda where the ICC indicted non-state actors, the Kenyan situation involved the Court's investigation and prosecution of powerful state officials who were also popular amongst their domestic constituencies. It therefore helped that I understood local languages and nuances, which were useful in analyzing the Kenyan situation. Moreover, the stronger networks that I had in the country enabled me to access the top political leadership, as well as the masses in ascertaining their interactions in the diffusion of ICJ. Hence, the Kenyan challenges became part of the analysis, and not just obstacles to it.

In sum, the recognition of my positionality as a researcher has wider implications for the claims made in this thesis. The arguments advanced herein are products of an enduring effort to achieve objectivity, while reflecting on the potential risks of my positionality for the overall ambitions of the thesis. I was therefore able to navigate the terrain of confronting biases in my research and deliver credible findings.

The decision to conduct a comparative study of Uganda and Kenya was supported by the two countries' positions as the ICC's first state-referral and *proprio motu* situations, respectively. Further, due to their precedents on the narratives of selectivity and neo-colonialism, they reveal contrasting but similar examples of politicization of the ICC's interventions and consequential implications for TJ. The two countries are also common law traditions, which provides a viable basis for comparing the ICC's interventions on domestic legal landscapes. Uganda and Kenya also present different post-conflict scenarios, with the former as a previously militarized entity and the latter as a highly ethnicized polity, which also makes a good case to draw comparisons.

Despite this thesis' simultaneous assessment of ICJ and TJ, there are differences of opinion in the scholarship regarding the relationship between the two normative paradigms. Debates still rage on whether ICJ and TJ are substitutes to one another, whether they are in competition, or complement each other (Arriaza 2013, 389). A common thread in these contestations is that the proponents of broad conceptions of TJ and ICJ perceive the two as interrelated, while advocates of a narrow view denote them as opposing paths (ibid, 390).

Although the aforesaid debate is beyond the scope of this thesis, it provides a more compelling reason to navigate the unexplored grounds of the impacts of politicized ICJ on the viability of TJ discourses. Taking cue from the inextricable link between ICJ and TJ, this thesis explores politicization of international criminal interventions and the impasse of TJ, whether or not the former is complementary to, or parallel to the latter.

### **Organization of this thesis**

The arguments in this thesis are presented in six chapters. This introduction is followed by **chapter 1**, which assesses the normative foundations and principles of ICJ, and challenges to universality that open up the ICC's interventions to the construction of narratives upon interventions. The chapter discerns the Court's establishment as an aspiration of the international community towards the construction of a moral universe where atrocity crimes do not go unpunished. Towards this end, the Court has attracted significant global ownership, in addition to its innovations on victim centeredness, international cooperation and complementarity. The ICC's relative global acceptance was boosted by the UN Secretary General's appraisal of its role in the TJ doctrines for transitional societies. The chapter also argues that the reality of

spatial hierarchies in the moral universe, where different actors and institutions possess varying power positions and goals, poses challenges to the universality of ICJ. In turn, the challenges expose the ICC's interventions to politicization by some domestic political elites, as exemplified in the narratives of selectivity and neo-colonialism. Nevertheless, the chapter concludes that the idea of a moral universe speaks to the ICC's expressivist functions – the ability to articulate expected conduct on the commission of mass atrocities – hence the ever relevance of the ICC.

**Chapter 2** discusses the status of affairs in Uganda's and Kenya's post-conflict scenarios in their efforts to build democratic peace. The chapter's focus provides the contextual background of domestic politics, their contributions to political violence, TJ mechanisms, and the politics' continuity on the ICC's interventions. In other words, the ICC's intervention is assessed together with TJ mechanisms in order to open up space for debates on how its politicization limited the opportunities for significant transformation of Uganda and Kenya. Evidently, there is still work to be done on "Uganda's steady progress" from militarism and "Kenya after 2007." This is because of their lingering challenges on democratization, and the negative implications of the narratives on the ICC's interventions for TJ mechanisms.

**Chapter 3** explains the conditions under which the ICC's interventions were politicized in Uganda and Kenya, as well as the mechanisms for this politicization. Overall, the chapter grapples with the quest for power, authority and legitimacy in the politics of post-conflict transition; within the local, and between the local and the international. The chapter introduces the GoU's and the Jubilee Alliance's orchestration of transactional and adversarial exchanges, which culminated in the

glocalization of ICJ. Consequently, it is shown that the fusion of global normative dispositions on ICJ and local political realities conditioned the uptake of the ICC's interventions amongst actors in local, regional and international spaces. Thus, this chapter develops a taxonomy of politicization of the ICC's interventions – transactional and adversarial exchanges about the moral universe, as exemplified in Uganda's selective referral and Kenya's neo-colonial narrative, respectively.

**Chapter 4** further explores the salience of the narratives on the ICC's interventions. The chapter commences with an elaboration of domestic normative contestations over ICJ and proceeds to assess the role of the narratives in overcoming this phenomenon. Specifically, the chapter discusses the GoU's referral of the LRA to the ICC, and the latter's subsequent disempowerment in the moral universe. Similarly assessed is the Jubilee Alliance's neo-colonial narrative that significantly galvanized their domestic support base while alienating them from the ICC and its supporters.

**Chapter 5** assesses the narratives on the ICC's interventions as antithetical to TJ mechanisms. Owing to their iteration of societal divisive binaries, the narratives impeded efforts at building long-term peace, in addition to aggravating some of the limitations of national efforts to redress the past. Further revelations of the narratives' antithetical credentials were their impacts beyond national borders. Whereas Uganda's selective referral deciphered the idea of the universality of ICJ (to other regional actors), Kenya's neo-colonial narrative renewed African protectionism to other conflict societies, such as Burundi and South Sudan. Collectively, the two sets of narratives had far reaching implications of undermining the ICC's legacies on the African continent.

**Chapter 6** presents the dilemmas of complementarity, as an assessment of the transferability of some of the ICC's principles in local spaces. The difficulties of replicating complementarity accrued from complexities in conflict scenarios and the Court's struggle for legitimacy and autonomy vis-à-vis local traditions in dealing with the past. By reinvigorating the peace versus justice debate, this chapter expounds domestic resistance to the Rome Statutes' complementarity regime, as exemplified in Uganda's amnesty process and the Jubilee Alliance's pervasive peace over justice messaging. In a nutshell, the chapter offers a more nuanced analysis of complementarity debacles in Uganda and Kenya, as opposed to arguments in favour of deliberate impunity for alleged perpetrators of mass atrocities.

The thesis concludes by summarising the foregoing arguments and broadly links them to the duality of international and domestic normative paradigms, or tensions between global governance and sovereignty. On the one hand, concerns on national sovereignty partly contributed to the ICC's predicaments in Uganda and Kenya, as well as on the wider African continent. On the other hand, the Court's normative imperatives significantly drive its acceptance in many quarters, including from some of its critics. With recent recession on Africa's collective withdrawal from the ICC, and the absence of a viable regional alternative to the Court, the universality of justice portends as the main challenge for global justice. Ultimately, any indication or perception of the Court's departure from the universality of justice will open up its interventions to the construction of narratives, as the Ugandan and Kenyan cases demonstrated.



## Chapter 1

### **Towards a moral universe: The International Criminal Court's establishment and emerging narratives on its interventions**

The Rome Statute which provided the legal foundations for the ICC's establishment reveals some of the intentions of the international community with regards to the commission of mass atrocities. Notably, the Statute indicates the aspirations of constructing a moral universe whereby atrocities do not go unpunished, in order to: contribute to their prevention, secure justice for victims and strengthen the rule of law. Some of the lasting impressions of these ambitions are the ICC's permanence and codification of international crimes in the Rome Statute.

In this thesis, the concept of a moral universe denotes the international community's determination to set the standards of rule and behaviour on the commission of heinous crimes.<sup>1</sup>Notwithstanding the foregoing intentions and definition, some other motivations justified the ICC's creation.

For instance, there are suggestions that ICJ leads to retributive justice and prevents revenge amongst victim populations (Akhavan 2001, 7-10). It is also argued that discussions on human security are anchored in the ICC's commitment to criminal accountability (Balasco 2013, 47). The Rome Statute also hints at the ICC's role in mitigating threats to "the peace, security and well-being of the world ... and shattering

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<sup>1</sup> This definition is partly derived from the Cambridge online dictionary. See

<http://dictionary.cambridge.org/dictionary/english/morality>

the delicate mosaic of cultural heritages.”<sup>2</sup> To some observers, ICJ contributes to national healing and reconciliation, as it serves as a neutral arbiter in societal conflicts (Wippman 1999, 474). However, the discussions in this thesis are limited to the idea of a moral universe because of its overarching themes and intentions.

Therefore, as a vital moral agent, the ICC was imbued with relative universal jurisdiction for international crimes. As such, the Court can intervene in unable and/or unwilling situations under three trigger mechanisms: state referrals, United Nations Security Council (UNSC) referrals and *proprio motu*. The ICC’s universality is also enhanced by its relative acceptance by several states across the world regions.

Critical in the ICC’s moral agency are also innovations in the Rome Statute, namely: victim centeredness, as well as the principles of cooperation and complementarity. Whereas cooperation calls for concerted efforts at combating impunity at the international and national levels, complementarity confers primacy of jurisdiction to national institutions, and provides for the ICC’s intervention as a last resort. The UN Secretary General also mainstreamed the ICC’s proactive role in TJ doctrines for post-conflict societies, due to its normative imperatives.

Despite the ICC’s centrality in the vision of a moral universe, challenges still abound on the universality of ICJ. In turn, the challenges open up the ICC’s interventions to the construction of narratives, such as Uganda’s selectivity and Kenya’s neo-colonialism. The remainder of this chapter will demonstrate how the challenges of universality on ICJ are occasioned by the aggregation of the moral universe into spatial

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<sup>2</sup> Excerpts from the first and third recital of the Rome Statute.

hierarchies (international, regional and local spaces), with discrete actors and institutions, that possess varying power positions and goals. The specific narratives constructed will then be discussed in chapters 3, 4 and 5.

The first part of this chapter elaborates the ICC's credentials in the vision of a moral universe, such as its normative imperatives, global ownership and the UN Secretary General's endorsement in TJ discourses. The chapter then turns to discussions of the challenges to universality of ICJ due to the aggregation of the moral universe into diverse spaces, and the opportunities they present for constructing narratives on the ICC's interventions. The chapter then concludes and ponders on the threats that challenges to universality pose to the idea of a moral universe. Consequently, I still contend that the ICC's expressivist function is significant in the idea of a moral universe by articulating the urgency of criminal accountability for international crimes.

### **1.1. Constructing the moral universe and the International Criminal Court's global ownership.**

The ICC was established in 2002, with a permanent seat at The Hague in the Netherlands, after the requisite ratification by 60 states. State ratification was preceded by the 1998 Rome Diplomatic Conference, in which some world leaders expressed the moral universe rhetoric on the occasion of the Statute's adoption.

During the conclusion of the UN diplomatic conference on the ICC's establishment, the then Italian Foreign Minister, Lamberto Dini, stated that the Court would "mark not only a political but a moral stride forward by international society" (Dini 1998, 2). Moreover, Dini observed that it was "not over-optimistic" to believe in the ICC's envisaged role in contributing to human security, harmonious co-existence and reduced

instances of mass violence (ibid, 2). According to the Chairman of the Conference's Drafting Committee, Cherif Bassiouni (Egypt), the adoption of the Rome Statute would significantly change the world. Bassiouni's optimism stemmed from the belief that the ceremony not only signified the final step of a historical process that had commenced at the end of the First World War, but also growing intolerance to impunity for perpetrators of international crime (UN 1998b, 1).

For his part, Philippe Kirsch, Chairman of Committee of the Whole Conference noted that the ICC would significantly impact on future generations (ibid, 1). Through the institution, Kirsch further argued, the global community had shown that "enough is enough" (ibid, 1). While for the then UN Secretary General, Kofi Annan, the ICC's establishment "was a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law" (ibid, 1).

Besides the rhetoric that followed the Rome Statute's adoption, some states took concrete steps to join the ICC, while others dithered. Even so, some powerful states that did not ratify the Rome Statute (notably Russia, the USA, China and Egypt), also welcomed the ICC's establishment and its envisaged universality.

For example, at the Sixth Committee of the UN General Assembly's meeting on the ICC's establishment, the Russian delegation argued for prioritizing practical steps towards the Rome Statutes' adoption and emphasized the importance of the ICC's jurisdiction for core crimes of genocide, crimes against humanity, war crimes and the crime of aggression (CICC 1995, 1). They also expressed the ICC's role in realizing the creation of a permanent ICJ institution for the first time in history (ibid, 1). In turn, the USA's delegation showed their readiness to progress with efforts to establish the

permanent ICC, despite the practical difficulties in creating an institution of such complexity (Borek 1995, 7).

The Chinese delegation declared their acceptance of the ICC's jurisdiction for international crimes and willingness to cooperate with other actors on the ICC's universality (Shiqiu 1995, 4-7). The Chinese were also pleased with the inclusion of the principle of complementarity in the preamble of the draft Statute and its broad support (ibid). While recollecting the gravity of international crimes and their consequences on populations, the Egyptian delegation called for a speedy drafting of the ICC Statute and the UN General Assembly's "clear and unequivocal position in favour of effective action" (Elaraby 1995, 4).

As of July 1998, the UN revealed that 26 states across the world regions had signed the Rome Statute, out of which 11 were in Africa (UN, 1998). By then, the African signatories to the Statute were: Cameroon, Ghana, Liberia, Madagascar, Mali, Mauritius, Namibia, Niger, the DRC, Senegal and Zambia (ibid). In addition, Ghana, Sudan, South Africa and Morocco were members of the Rome Statute's drafting committee (UN 2002, 69).

Evidently, African states assumed ownership of the ICC's process, including Kenya's Vice-Presidency during the Rome Conference (Shiundu 2013a,1). As the Kenyan delegation argued, "there must be a strong political will on the part of state parties that would sign and ratify the Statute" (ibid, 1). Kenya finally signed the Statute on August 11, 1999 (ibid), followed by ratification in May 2005 (ICC, 2017a). For Uganda, the then Deputy Attorney General and Minister of State for Justice and Constitutional affairs observed that the country's "special relationship with the Court started at the

foot of the Seven Hills of Rome during the diplomatic conference in 1998,” which culminated in the Statutes’ ratification in 2002 when it came into force (Ruhindi 2009, 2).

To date, the total count of Africa’s membership in the ICC is 34 states as part of remedies for some of the injustice experienced on the continent (AU 2017a, 1). Africans’ ownership of the ICC was partly informed by an envisaged renewal and liberating the continent from previous atrocities, including: the 1980s and 1990s violent incidence, international inaction during the Rwandan Genocide of 1994, injustices of apartheid in South Africa, and European colonialism (ibid).

Outside Africa, the ICC founding treaty was welcomed as a defining moment in world history. For example, a pioneer ICC judge, Hans-Peter Kaul, hailed the Rome Statute as “the most important treaty since the adoption of the UN Charter in San Francisco in October 1945” (Kaul 2011, 1). Kaul also lauded the Rome Statute for its revolutionary codification of international crimes (genocide, crimes against humanity and war crimes) on voluntary consent of the global community. Accordingly, Judge Song (2014, 1) argued that the adoption of the Rome Statute reflected a major advancement towards a better world. Song also suggested that the spirit of the 1998 Rome Conference was comparable to that of the Universal Declaration of Human Rights in 1945 (ibid).

Furthermore, it was argued that the 20th century experienced the worst and the best moments: with the former as World War I and II, and the latter as the latter as the creation of global law and institutions (Paris 2017, 1). In this vein, Schabas (2011, 61) posits that since the UN’s creation, the ICC is the most interesting and ground-breaking

advancement in international law. Schabas described the Rome Statute as one of the most complicated international treaties, which he believes is a “sophisticated web of highly technical provisions” that are derived from comparative criminal law and political provisions that encroach into concerns on state authority (ibid, 61).

Driving the ICC’s acceptance across the globe is the Coalition for the ICC (CICC), a conglomerate of over 2,500 organizations operating in 150 countries (CICC, 2017). The organization enlists its vision as: “a more peaceful world through universal access to justice for victims of war crimes, crimes against humanity and genocide” (ibid, 1). As a CICC official revealed, the organization’s advocacy for ICJ made it possible to draft the Rome Statute amidst some resistance from the big powers (Interview, The Hague, Netherlands, 23 July 2015).

From its secretariat in The Hague, the CICC actively monitors the ICC’s judicial activities and disseminates them to the wider public through internal and external communication tools (ibid). In so doing, the CICC provides a service that nobody else, including the ICC, delivers – making a huge amount of information accessible and understandable worldwide (ibid).

Similarly informing the ICC’s global acceptance is the limited reach of other international or special and hybrid criminal tribunals. For example, the UN sanctioned Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) are confined to specific countries and crimes (UN, 2007; ECCC, 2014).

Likewise, previous *ad hoc* tribunals, such as the International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and

the Special Court for Sierra Leone (SCSL) were insufficient in responding to global atrocities. As Theodor Meron, former ICTY President and presiding judge of the Appeals Chambers of the ICTR and ICTY reveals, “the establishment of the ICC created a mantra that the international community was tired of *ad hoc* tribunals which are expensive, slow and selective” (Meron 2011, 142).

In turn, the ICC was to be practically universal, more effective and less costly (ibid). As opposed to the *ad hoc* tribunals, the international community imbued the ICC with universal jurisdiction for international crimes. Thus, for African countries that sought emancipation from their past atrocities and injustices, the ICC was a significant route, given its envisaged universal reach.

#### **1.1.1. The International Criminal Court and universality**

The ICC establishes jurisdiction for heinous crimes in case of domestic lapses in commencing proceedings for the most responsible perpetrators. The Court’s trigger of jurisdiction is popularly known as the admissibility test, which is elaborated in Article 17 of the Rome Statute. Under this provision, admissibility is premised on the ICC’s *prima facie* declaration of domestic inability and/ or unwillingness to genuinely commence investigations and prosecutions of the most responsible perpetrators of core crimes. For Megret (2017), admissibility denotes “notions that are interpreted strictly to cover states that are either committed to ensuring impunity or too weak to even carry out prosecutions.”

Article 17 (2) of the Rome Statute expands and clarifies other considerations on admissibility. In determining unwillingness, the ICC shall consider whether: national proceedings are or were designed to shield suspects from criminal responsibility; there



are unjustified delays in the prosecutions; and that the proceedings are or were not impartial or independent. For inability, Article 17 (3) provides that the ICC considers:

Whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Further lending credence to the ICC's universal jurisdiction are its interventions that potentially accrue from three different mechanisms: state referrals (Art.14); UNSC referrals (Art.13 (b) and *proprio motu* or own motion provision (Arts. 13(c),15 and 51 (1)). On these accounts, the ICC potentially establishes jurisdiction over international crimes whether a state is a party to the Rome Statute or not, and whether a state party opts to refer a situation to the Court or not.

The availability of various intervention mechanisms opened up the ICC to several African member states, including those that were yet to ratify the Rome Statute. Moreover, pursuant to Article 12 (3) of the Statute, non-state parties might accept the ICC's jurisdiction in an *ad hoc* basis by submitting such declarations to the Court. For instance, as a non-state party, Ukraine submitted such a declaration and thereby accepted the ICC's jurisdiction over crimes committed on its territory from 21st November, 2013 to 22nd February, 2014 (ICC, 2014a). In the African context, Côte d'Ivoire's ICC's *proprio motu* intervention in the 2011 political crisis was made possible by the country's earlier acceptance of the Court's jurisdiction in April 2013 and not Statute ratification (ICC, 2017a).

The parties to the Rome Statute coalesce under the Assembly of State Parties (ASP), which is the ICC's legislative and management oversight body (ICC, 2017b). The ASP Bureau comprises a President, two Vice Presidents and 18 elected members for a three-year term, with considerations on geographic balance and representation of the world's legal principles (ibid). Non-state parties are allowed observer status in the ASP, though with no voting rights. To date, the ICC has a 123<sup>3</sup> state membership across the world, which adds to its universal reach.

Conversely, the reluctance of some major powers (the USA, Russia, China, India, Pakistan, Indonesia and Israel) to ratify the Rome Statute undermines the ICC's relative global acquiescence. Nevertheless, some of the powers – the USA, China and Russia – accepted to play major roles in some of the ICC's processes via the UNSC. Through Articles 13(b) and 16 of the Rome Statute, the council refers and defers situations respectively. Examples of the UNSC's referrals are: the situation in Darfur, Sudan vide Resolution 1593 (2005) in March 2005 (ICC, 2005a), and the Libyan February 2011 referral under Resolution 1970 (2011) (ICC, 2011a).

Collectively, the ICC's intolerance to impunity for heinous crimes and demonstration of capacity to intervene in case of domestic lapses account for its normative imperatives. These normative attributes also stamp the ICC's moral authority and position as a Court of last resort. Further giving credence to the ICC's normative imperatives are innovations in the Rome Statute – victim centeredness, cooperation and complementarity. With such commitments, the ICC strengthens the international

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<sup>3</sup> Number of state parties as of the time of writing.

community's resolve in combating impunity for alleged perpetrators of mass atrocities, as will be discussed in the following section.

### **1.2. Innovations in the Rome Statute: victim centeredness, cooperation and complementarity**

The Rome Statute's innovations reinforce the ICC's normative imperatives by not only articulating the global struggle against impunity for heinous crimes, but also provide roadmaps on how this is to be done. The Court's victim centeredness, cooperation and complementarity regimes are indicative of structural relationships between the ICC and national judicial systems, thus prevail as some of the "most important foundations of the ICJ system as established by the Rome Statute" (Song 2014, 2). Upon the commission of atrocities, therefore, African situations were to share in the Statute's innovations, if their resolutions of emancipation were to be accorded the importance they deserved.

First, unlike the *ad hoc* tribunals, the ICC takes a more progressive approach towards victim centeredness, both under statutory provisions and in administrative practice. As a first step, the Court predicates the commencement of investigations on the interests of victims as articulated in Article 53 of the Statute. Additionally, Article 68 provides for "protection of victims and witnesses and their participation in Court proceedings." Next, Article 75 espouses a reparations regime, which is expanded under Article 79 that provides for the Trust Fund for Victims (TFV).

To enhance victims' participation, the ICC created the Office of Public Counsel for Victims (OPCV), and the Victims Participation and Reparations Section (VPRS) in addition to field outreach offices. In contrast, *ad hoc* tribunals only relied on witness

testimonies under the arguments that they should not be subjected to further victimization in the ICJ system (Megret, 2017). As the Office of the Prosecutor (OTP) avers, the Rome Statute empowers victims with rights to independently express their views and concerns during Court proceedings (ICC 2010a, 5).

The ICC is therefore hailed as a victims' Court, owing to the provisions on victims' participation in proceedings, reparations, and legal assistance (Stover 2010, 4). The Court's victim centeredness also enhances their visibility during the commission of atrocities (Megret, 2017).

Before the ICC's establishment, the UN had adopted the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" (UN, 1985). The declaration pressed for the adoption of local and international frameworks of facilitating "the universal and effective recognition of, and respect for, the rights of victims of crime and of abuse of power" (ibid, 1).

Consequently, the ICC's victims' consciousness was alive to growing international consensus on best practices when dealing with atrocity crimes. As the OTP reveals, the ICC has regard to the treatment of victims humanely, their dignity, respect as well as their "safety, physical and psychological well-being and privacy, and that of their families" (ICC 2009a, 2). According to Judge Song (2010, 6), the Court's victim centeredness is one of the Rome Statute's major successes because it allows for substantial integration of victims in the Court's processes, even if not summoned as witnesses.

Second, the Rome Statute articulates the principle of cooperation in the global war on impunity for atrocity crimes. In the fourth recital of the preamble, it is affirmed that

the effective prosecution of international crimes “must be ensured by taking measures at the national level, and by enhancing international cooperation.” Within the text of the Statute, the principle of cooperation is propounded in part IX, on ‘international cooperation and judicial assistance.’

More explicitly, Article 86 deliberates on ‘general obligation to cooperate,’ compelling states to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” Article 87 dwells on the channels for this cooperation, while Article 88 mandates states to “ensure that there are procedures available under their national law for all of the forms of cooperation.” From Articles 89 to 100, there are express provisions for requests to national jurisdictions with regard to surrendering suspects to the Court.

Despite the obligations cooperation imposes on states, the principle emerges as a fundamental limitation of the ICC, just as in other international criminal tribunals (Peskin, 2008). As Judge Kaul (2011, 8) suggested during a key note address at Salzburg Law School, state cooperation is one of the most significant challenges that the ICC continues to face. Decrying the Court’s dependence on state cooperation, Kaul noted how the ICC is wholly dependent on state cooperation, thus its lack of executive power and major weakness (ibid, 8). In a similar vein, Judge Song registered the ICC’s frustrations of inadequate cooperation in the Darfur case, and the UN system’s inability to impose obligations on states to do so (Song 2014, 5). Narratives on the ICC’s interventions thrive under conditions where the institution expects cooperation from domestic political elites, some of whom are adversely mentioned in the commission of atrocities.

Closely linked to the cooperation regime is the principle of complementarity, which is expressed in the preamble and Article 1. In the preamble, it is “emphasized that the ICC is established to be complementary to national criminal jurisdictions.” Further, Article 1 states that “the Court is established ... as a permanent institution ... and shall be complementary to national criminal jurisdictions.”

Since then, the principle of complementarity has attracted many interpretations on its ideational intentions and applicability. According to Triffterer (2008, 10), the ICC’s limitations obligate states to take a proactive role for an efficient and effective war on impunity. For Kleffner (2003, 87), the Court’s conferment of primacy of jurisdiction to national judiciaries has helped to manage sovereignty concerns. For his part, Meron (2011, 160-162) posits that national proceedings potentially escape the difficulties associated with international trials and are likely to be more accepted by victims and local populations. In this regard, the principle of complementarity could be interpreted as a ‘safety valve’ against the ICC’s shortcomings and sovereignty dilemmas it poses to states.

Furthermore, the complementarity regime was associated with the Rome Statute’s role in accountability norm diffusion and leverages on case admissibility. In this regard, Meron (2011) posited that the principle of complementarity has likelihoods of a trickle-down effect on local legal regimes. Similarly, Nouwen (2013) described the ICC’s envisaged catalyzing effects, which are premised on normative responsibilities ascribed to states, and rational choice considerations for avoiding the Court’s interventions with domestic reform initiatives. As Burke-White (2008, 56) rightly

argued, deterring the ICC's intervention with genuine national proceedings points to the admissibility test in Article 17, which is a passive form of complementarity.

Consequent to the expansive interpretations of the principle of complementarity, the OTP embarked on expert consultations in order to “put complementarity into practice” (ICC, 2003). The consultations led to deliberations that complementarity might be informed by two guiding principles: partnership and vigilance (*ibid*, 3). Whereas partnership denotes a positive and constructive relationships between the ICC and concerned states, vigilance points to the Court's due diligence in carrying out its duties and ensuring that national proceedings are genuinely conducted (*ibid*).

Afterwards, the OTP adopted ‘positive complementarity,’ (which is not mentioned anywhere in the Rome Statute), as symbolic of a “mutually reinforcing international justice system” (ICC 2006, 5). According to the OTP, a “positive complementarity” would mean encouraging genuine national proceedings, while relying on national and international networks under a system of international cooperation (*ibid*, 5). As a core principle of the OTP's 2006-2009 prosecutorial strategy, positive complementarity was envisaged to maximize the Court's impacts (*ibid*, 4).

At its eighth session in New York in 2010, the ASP deliberated on the concept of positive complementarity while evaluating the Kampala Review Conference proceedings, and mechanisms of strengthening the ICC system (ASP, 2010). Thereafter, the ASP agreed to promote exchanges between the ICC's member states and other relevant stakeholders (UN organizations, international organizations, donor agencies, academic institutions and CSOs) in strengthening the capacity of national jurisdictions (*ibid*, 3). Also, the ASP made reference to pledges and future works on

complementarity (ibid). This was in addition to explicit pledges on helping with the ICC implementing legislation, building national capacities in order to enable them investigate and prosecute atrocity crimes, as well as other capacity building frameworks (ibid, 4).

After the ASP's support and endorsement, the OTP promulgated 'positive complementarity' as a proactive policy of cooperation aimed at promoting national proceedings for international crimes (ICC 2010b, 5). Similarly included in the principles' role was the sharing of information with national institutions on request; exchanges on expertise and trainings with experts and lawyers from situation countries; cooperating with international bodies and liaising with development organizations to promote accountability (ibid, 5).

Despite 'positive complementarity's' prospects in closing impunity gaps, it is not immune to cooperation dilemmas, just like its passive variant. This is an indication of the practical difficulties in the transferability of some of the ICC's innovations to local realms. This reality negates Judge Song's (2014, 3) convictions of how complementarity propels the war on impunity at two levels concurrently: building local capacities and affirming global institutions.

Yet still, the ICC's struggle against impunity for serious crimes, together with its innovations of complementarity, victim centeredness and cooperation endear it to wider acceptance, including in the UN system. The ICC has a special relationship with the UN, which was formalized in a 'Negotiated Relationship Agreement' in October 2004 (UN, 2004a). In the agreement, the UN acknowledged the Court's significance in dealing with serious crimes, which also threaten the peace, security and well-being of



the world (ibid). More importantly, the UN Secretary General appraised the ICC's role in the TJ doctrines that are prescribed for societies emerging from authoritarianism or conflict.

### **1.3. Mainstreaming the International Criminal Court's role in transitional justice discourses**

Over time, TJ has emerged alongside ICJ as remedial actions for transitional societies in their efforts to overcome past abuses that accrue from democratic and rule of law deficits. Subsequently, many UN Secretary General's notes and policy documents prescribe and endorse TJ doctrines in order to deal with the past, and build more peaceful polities (UN, 2004b; UN, 2010). More importantly, the Secretary General mainstreams the ICC's proactive role in TJ mechanisms owing to its normative imperatives (ibid).

Doctrinally, the "Report of the UN Secretary General on the rule of law and transitional justice in conflict and post-conflict societies" premises the normative foundations of TJ on the UN Charter, together with the four pillars of contemporary international legal system (UN 2004b, 5). The pillars consist of: international human rights law, international humanitarian law, international criminal law, and international refugee law (ibid). Moreover, the report contends that the pillars are indicative of universal norms that are agreed on under the UN's leadership (ibid, 5).

Further, the report asserts that TJ norms have been produced, accepted and accommodated by "the full range of legal systems of Member States, whether based in common law, civil law, Islamic law, or other legal tradition" (ibid, 5). Therefore, the

norms' legitimacy cannot be contested on the rationale of legal imperialism, and they define the normative foundations of the UN's activities (ibid, 5).

Second, the "Guidance note of the Secretary-General on the UN's approaches to transitional justice" explicitly outlines the components of the TJ doctrine and its execution. In the note, TJ has been defined by the UN (2010, 3) as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation." The note further elaborates that TJ consists of "both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof" (ibid,3).

Intuitively, the various 'tools' outlined by the global body represent the evolution of justice sought. On the one hand, there is an emphasis on punitive justice and accountability for atrocities committed, and restorative and reparative justice on the other hand. This dichotomy obtains from the recognition of victim centeredness while redressing the past; thus, a need for restoration and reparation. The other consideration is a need for focusing on alleged perpetrators, hence the utility of retribution. Besides, victims often articulate the mixed goals of TJ by favouring all approaches (Lambourne, 2009). The UN (2004b, 1) also provides a cautionary note and recommends a comprehensive justice sector and attention to complementary roles between the various components of TJ.

Furthermore, the UN Secretary-General argues that due to their integrated and interdependent qualities, TJ mechanisms "can contribute to achieving the broader

objectives of prevention of further conflict, peacebuilding and reconciliation” (UN 2010, 3). The Secretary-General also revealed the intentions of TJ as strengthening the rule of law at national and international levels, with the aim of contributing to lasting peace (ibid).

From the UN Secretary-General’s clarifications, it has been argued that the TJ discourse is embedded in and premised on the liberal peace thesis. In the frontline of advancing this view is Paris (2004, 5), who predicts that the perception that advancing liberalization in post-conflict societies would lead to favourable conditions to lasting peace is the “unstated but widely accepted theory of conflict management.” This follows from the underlying hypothesis of the liberal peace paradigm that liberal democracies do not go to war with each other and have less propensity for internal violent conflict (Doyle, 2012). The liberal peace theory suggests that the more liberal democratic polities there are, the more the international order is likely to be stable and peaceful (Howard, 2001). The liberal thesis builds on Kant’s ‘To Perpetual Peace’—the foundation of international liberal thought (Paris, 2006).

While the UN Secretary-General’s note welcomes the active role of national institutions in liberal peacebuilding, it is also acknowledged that domestic criminal trials might be undermined by inability/unwillingness (UN 2010, 14). Given this reality, the Secretary-General contends that the international community has a critical role in dealing with alleged perpetrators of mass atrocities (ibid).

As such, the Secretary-General’s note reveals that the ICC provides renewed hope in confronting impunity for international crimes, because previous experiments of *ad hoc* tribunals had little domestic impacts in judicial administration (UN 2010, 2.). More so,

the Secretary-General made specific reference to the Rome Statute's complementarity regime, noting that it uniquely enhances the ICC's ability to promote the development of local capacities in the prosecution of alleged perpetrators of international crimes (UN 2010, 8)

Similarly, in the Secretary-General's "Report on the rule of law and transitional justice in conflict and post-conflict societies," reference is made to the ICC as representing the international community's aspirations in combating impunity. Herein, it is deliberated that the ICC is: undeniably the most important recent advancement in the global community's struggle to promote the rule of law, and its impacts are already felt by sending messages to potential perpetrators and catalyzing domestic legislation for international crimes (UN 2004b, 16).

In summary, the ICC's relative universality, together with its normative imperatives affirm the international community's commitment in combating impunity. This is in addition to further commitments from the UN-Secretary General who positions the Court in a broader discourse on TJ. Nonetheless, challenges still abound on the universality of ICJ, owing to the reality of spatial hierarchies where diverse actors and institutions possess different power positions and goals on ICJ. In turn, the impediments to universality expose the ICC's interventions to the construction of narratives, such as its accusations of selectivity and neo-colonialism in Uganda and Kenya, respectively.

#### **1.4. Challenges to the International Criminal Court's universality in local, regional and international spaces.**

The ICC interacts with an array of actors and institutions in international, local and regional spaces during its processes that range from initiation of investigations to actual trials. However, the disparities in power positions and goals on ICJ within the spatial hierarchies undermine the ICC's normative imperatives and expose it to politicization. More specifically, contradictions in the international system, solidarity in the regional space, and normative contestations in local spaces challenge the ICC's vantage position as a Court of last resort in the global war on impunity for international crimes.

In assessing the international system, specific reference is made to the roles of the UNSC and individual member states in the ICJ regime. Discussions on regional solidarity focus on the ICC's reception amongst collective actors, such as the AU and the European Union (EU). The local space also attends to collective action with regard to the ICC's interventions amongst political elites, affected communities, victims, religious groups and other interest groups, albeit under competing ideological and power positions.

##### **1.4.1. Contradictions in the international system**

The powerful role of the UNSC in the ICJ regime stems from Chapter VII of the UN Charter on maintaining international peace and security. Recognizing this duty, the drafters of the Rome Statute conferred significant authority to the UNSC – in the ICC's referral and deferral regimes. Notwithstanding the UNSC's leadership roles in the ICJ regime, the institution and some of its member states demonstrate apparent contradictions between their actions and responsibilities as ascribed in the Statute.

Whereas some UNSC members have committed global atrocities with impunity, some have reportedly shielded their allies from the ICC's reach, failed to ratify the Rome Statute, or publicly condemned the Court. Indeed, Meernik (2013, 179) rightly reminded us that practically, the international community is best understood as actors with contradictory goals, rather than a unitary actor with clear interests. In turn, the inconsistencies in the UNSC undermine its institutional leadership on ICJ, with knock on effects on providing incentives for the narratives on the ICC's interventions to flourish in local and regional realms.

Contemporary accounts of global atrocities cannot escape mentioning some of the UNSC members. As a fact, all the Permanent 5 (P-5) members of the UNSC but China have participated in deadly conflicts, and consequently committed crimes that fall within the ICC's jurisdiction. These include the 2001 Afghanistan conflict which involved the active participation of the USA, United Kingdom (UK) and France, the USA and UK war in Iraq (2003), and Russia's wars in Georgia (2008), Ukraine (2014) and Syria (2015).

Despite their apparent roles in the commission of atrocities, non-council ICC member states are beyond the ICC's reach since they would veto any resolutions on the Court's intervention. Also, only two UNSC P-5 members – UK and France – have ratified the Rome Statute. Whereas the USA and Russia withdrew their signatures after apprehensions on the ICC's reach, China has not made any steps to join the Court. Nevertheless, any of the P-5 can veto council resolutions, including on the ICC referrals.

Further, Russia, China and the USA are on record for using their veto to protect their allies from the ICC's jurisdiction (Plessis, 2013). To this end, Israel has benefited from the USA's veto, while Syria has China's and Russia's protection. Conversely, the council members unanimously agreed to refer situations in Libya and Sudan to the ICC, which stoked flames of an African bias and the Court's use by world powers (Plessis, 2013). Additionally, the council resolutions on the referrals excluded the ICC's jurisdiction on foreign nationals (international actors) to ostensibly shield them from justice (Bosco, 2014a).

Besides the USA and Russia's reluctance to join the ICC, some of their senior officials publicly condemned and delegitimized the Court despite their earlier acceptance of its utility. While announcing the withdrawal of Russia's signature from the ICC in 2016, the Foreign Ministry declared that the Court is inefficient, dispenses one-sided justice and failed to meet the expectations of the international community (Bowcott and Walker 2016, 1).

The statement on Russia's withdrawal from the ICC followed the Court's publication of a report that denoted the country's annexation of Crimea as an occupation (ibid). Most probably, Russia's U-turn also stemmed from a possible ICC intervention in Syria, where the country was accused of committing war crimes (ibid). As a result, Russia declared its intentions of not cooperating with the ICC or ratifying the Statute in the near future (ibid). Towards this end, a Russian official recalled their earlier support for the ICC and belief in its contribution to stability, which would be alternated with a change in attitude (ibid, 1).

Similarly, some senior officials in the USA administration continued to undermine the ICC in public platforms. For example, a former official in the Bush administration, Jendayi Frazer, noted in 2013 that “the ICC indeed has fallen far from the high ideals of global justice and accountability that inspired its creation” (Frazer 2013, 1). According to another official, the ICC is an irredeemably defective institution, the OTP is unaccountable, and it would be used to instigate politicized trials for American citizens (CNN 2000,1).

Moreover, due to the probability of the ICC’s intervention in Afghanistan where some American soldiers committed atrocities, the USA’s former point man on global justice, Stephen Rapp, reaffirmed their initial policy that limited the Court’s jurisdiction to member states (Bosco 2014b, 1). The apparent contradiction in Rapp’s argument was that the USA found wisdom in (1) the UNSC’s referral of Sudan and Libya to the ICC, equally non-member states, and (2) demanding compliance with the ICC from third countries, such as Kenya, Uganda and Sudan (Joselow, 2013; Associated Press, 2016; Lubis, 2016)

The USA’s opposition to the ICC began during the Clinton era, when the country failed to secure immunity for its citizens who were liable for criminal prosecutions (Washburn 1999, 13). During a UN General Assembly meeting on the ICC’s establishment, the USA’s delegation suggested that the deliberations were acts in futility, and academic perspectives which did not take into account political realities (Borek 1995, 3). Consequently, the Clinton administration declared its objections to the Rome Statute, and indicated its unwillingness to submit it to the Senate for “advice and consent to ratification” (Arieff et.al. 2011, 3). Subsequently, in 2002, during the



successor Bush Administration, the USA notified the UN of its intentions of not joining the ICC (ibid).

To fence off the ICC from establishing jurisdiction amongst Americans, the Bush government passed the ‘American Service Members Protection Act of 2002’ (ASPA), popularly known as ‘The Hague Invasion Act.’ The Act prohibited the country’s cooperation with the ICC, and also provided for the USA’s invasion of the Court in the event of a citizen’s apprehension. In addition, the Act restricted the USA’s participation in peace-keeping missions around the world, unless immunity was guaranteed for its soldiers. As the CICC (2002, 1) observed, the passage of the ASPA “entrenched the USA’s offensive” against the ICC at the national level.

Besides, the USA promoted and signed Bilateral Immunity Agreements (BIA) with other countries, albeit with diplomatic carrots and sticks. In so doing, the USA traded financial aid and military assistance with prohibition of third countries from turning American citizens to the ICC (Human Rights Watch, 2003). The USA’s current policy of informational and diplomatic assistance to the ICC on a case by case basis (Arieff et.al., 2011) also negates the Rome Statute’s aspirations of universalizing justice. This is in addition to the USA’s suggestions that Palestine’s decision to join the ICC was counterproductive for peace (Department of State, 2015; 2016) in light of its support for Israel in the protracted conflict.

In summary, the inherent contradictions in the international system reduce the costs of non-compliance with the ICC and expose it to malleability in local and regional spaces. More specifically, inconsistencies in principle and practice within the UNSC feed into perceptions of subordination to global powers amongst less powerful actors, which

gives them incentives to resist the ICC's intervention. In other words, the contradictions potentially inspire collective action amongst affected local and regional actors, and assertions of their relative power and sovereignty vis.a.vis. powerful global players.

To illustrate, Kenya's neo-colonial narrative had undertones of the ICC's focus on weak states, but not the powerful might of global powers who similarly committed international crimes that deserved the Court's attention. In a similar vein, the AU's solidarity against the ICC was partly informed by the UNSC's decisions to refer African situations to the Court, and its focus in Africa, but not equally deserving cases in other regions. Giving credence to such local and regional perspectives on the ICC is the fact that Africa is under represented in the council as "over-represented members bargain and haggle over their interests at the expense of its mandate" (Republic of Kenya 2014, 2).

Pursuant to the contradictions in the UNSC, aspersions have been cast on its institutional leadership and relationship with the ICC. For example, the South African Chief Justice, Mogoeng Mogoeng argued that it seems hypocritical that some UNSC members find inspiration to refer African situations to the ICC, yet they are reluctant to join it (Kuteesa 2017,1). Thus, Mogoeng posed, "If you believe that an institution is good, you have to lead by example; sign up so that when you violate you can also be taken there" (ibid, 1). According to Evenson (2016, 1), the UNSC's paralysis has rendered it unable to address human rights crises in many parts of the world, such as in Syria and South Sudan.

More specifically, the contradictions lower the USA's moral standing as a proponent of international norms that demands state compliance within its domestic spheres of influence. This is particularly problematic given that, as a P-5, the USA can refer other state parties to the ICC, but it is itself protected. As such, any efforts by the USA to demand compliance with the ICC amongst situation countries raise suspicions on the country's intentions. For example, a Sudanese official asked the Americans to join the ICC or shut up, when the USA demanded for the arrest of al-Bashir (Lubis, 2016). Similarly, President Hage Geingob of Namibia chided the USA to ratify the Rome Statute as a precondition for his country to remain in the ICC, at a time mass African collective withdrawal from the Court was gaining momentum (Milhench, 2016). For a Ugandan government official, the USA is the least qualified to ask for democratic governance due to its projection of raw power globally (Semakula 2016, 1).

Turning to the local, domestic (political) translations of ICJ is predictable, owing to the focus on political elites as suspects or government officials whose cooperation is demanded or pursued. Therefore, the political elites' leverages on state cooperation, together with their influence in local contested sovereignties inform their relative power vis-à-vis the ICC's.

#### **1.4.2. Local spaces as contested sovereignties**

Traditionally, sovereignty entails the government's authority over all actors, institutions and resources under its territorial control. The concept emerged from the 1648 treaty of Westphalia which ended 30 years of war in Europe, and later evolved to define the modern state. As Axtman (2004, 4) opines, the treaty asserted the state's power over various interest groups, as well as the states' control of the population.

More so, the Westphalian state model entailed formal rights of the state's autonomy and legitimacy in the international system, with abilities to interact with other states and sign international treaties (Slaughter 2004, 284).

Given that sovereignty delineates the domestic arena from the international, state governance aims to create a careful combination of people, space, and resources under conditions of territorial constraints (ibid, 260). In addition, national spaces are fragmented into transnational or sub-national forms, which provide contexts for enduring "mutual alienation and inter-spatial violence" (Heathershow and Lamberch 2008, 11).

With the increasing internationalization of decision making and the visibility of transnational actors, the idea of sovereignty is under constant threat. Indeed, in contemporary international relations, the Westphalian sovereignty model is under tension from ineffectiveness and interference challenges (Slaughter 2004, 284). Whereas the first set of challenges emerge from international political and economic interdependence, the second accrues from collective action in case of threats to international peace and security, and the diffusion of the human rights regime (ibid).

As a result of the receding role of the state in national affairs and international relations, there is an increasing shift towards internationalism, which in turn grapples with sovereignty concerns. As such, an ICC official attributes some of the institution's challenges to "a retreat into inward looking political/philosophical considerations, fears in sovereignty and more demands to national interests, which are not easy sails for political elites" (Interview, The Hague, Netherlands, 22 July 2015).

From Strang's (1996, 2) conception of the state as an autonomous actor in continuous exchange and competition with other states, I suggest that varying actors within the state are in constant altercations with other organized groups under minimal restraints. This links to the idea of "the disaggregated nation-state," whereby distinct segments are motivated by their own interests, but in conflict with sovereignty itself, and with other forces within the nation (Fonte 2011, 2).

Upon interventions, the ICC is likely to confront a wide spectrum of actors and institutions with a continuum of ideological orientations. Some of the ICC's critical constituencies are: political elites, victims, government officials, affected communities, governance and human rights activists and other interested parties. Depending on their uptake of the ICC's interventions and ideational orientations, the various actors and institutions broadly fit into either its promoters or opponents (Boesenecker and Vinjamuri, 2011).

Given their positionality as the accused or state officials (or a combination of both) whose cooperation is required for effective prosecutions, political elites have emerged as critical actors for ICJ. As a result, their uptake of ICJ can either result in co-option or resistance of individuals and other groups (Heathershow and Lambach 2008, 11). In short, political elites' domestic influences on ideological orientations extend to the ICC's interventions.

The ICC's dependence on political actors for cooperation and the Court's interventions in protracted conflicts submerges it at the very heart of domestic political struggles. As Kaul (2011, 9) had predicted, the ICC would be predisposed to the extreme binaries of vicious power politics and commitment to law and human rights. As such, the ICC is

not immune to either (mis)appropriation or subversion by political actors in domestic spaces. Whereas forms of misuse include the utility of the state-referral regime to fight political or military opponents, elements of subversion can entail counter-accusations, such as construction of neo-colonial narratives on the Court's interventions.

For instance, the ICC has been accused of selectivity by some victim groups and affected communities in Uganda, the DRC and Côte d'Ivoire, in their quest for the universality of justice. In Uganda, the ICC's focus on the LRA's atrocities after the government's referral resulted in perceptions of one-sided and politicized investigations and prosecutions (Clarke 2008, 42). Dominant discourses in northern Uganda and amongst the political opposition in Kampala was that the ICC emerged as Museveni's political instrument (ibid, 42).

Similar accusations followed the DRC's referrals of Thomas Lubanga, Germain Katanga and Ngudjolo Chui to the ICC. The same scenario unfolded in Côte d'Ivoire, where President Alassane Ouattara cooperated with the Court in pressing charges on his rival's camp – Gbagbo – while insulating his side from close scrutiny (see for example, Knoops and Zwart, 2013). Altogether, the cases were reminiscent of the Nuremberg trials in which victors' justice was the reigning orthodoxy, as opposed to the universality of justice, when Allied forces (the USA, Russia, UK and France) conducted one sided trials against the Nazi regime after World War II (Earl, 2009).

The ICC was also regularly accused by some affected political elites of fostering neo-colonial intentions in Africa. The neo-colonial narrative was predominant in the UNSC's referral of Libya and Sudan to the ICC, and the Court's *proprio motu* intervention in Kenya's 2007/2008 PEV. More interestingly, in the Kenyan situation,

two of the ICC's accused – Kenyatta and Ruto – employed a calculated mix of cooperation and normative challenges to the ICC's intervention under the neo-colonial interpretations.

Despite the neo-colonial narrative's prominence in framing Kenya/Africa – ICC relations, it was contested by some African states, notably Botswana (Clottey, 2013), and some local governance and human rights activists (KPTJ, 2015). Yet still, the narrative gained traction both nationally and regionally. This was due to the ICC's exclusive focus in Africa, the West's visible support for the Court financially, logistically and in policy positions abroad, and Africa's history of western domination through colonialism and slavery (Hoile, 2014).

In contrast, some have argued that statistically speaking, the rate of atrocities committed in Africa would make it a natural focus for the ICC after all (Maluwa et al. 2013, 2; Plessis, 2013,2). Although this argument is an effective counterpoint to the neo-colonial narrative, I disagree with its factual foundations. Whereas the commission of atrocities on the African continent cannot be downplayed, the suggestion that Africa is the natural choice for the ICC subsumes practical challenges on the universality of ICJ, which extend beyond the continent.

Besides, recent studies and developments reveal the global spread of conflicts and commission of atrocities, hence the reach of ICJ should not be exclusive to the continent. As Straus (2008) rightly argues, large scale politically instigated conflicts in Sub-Saharan Africa are on the decline, and data sets relieve the region from the tag of 'the most war endemic' in duration and intensity. Instead, empirical evidence points to Asia as the most conflict prevalent.

Furthermore, the repercussions of recent Syrian, Israeli/Palestinian and Yemen conflicts have been catastrophic and more intense than some of Africa's conflicts that attracted the ICC's prompt interventions. For example, a UNSC (2016, 2) report reveals that as of 2015, Syria's protracted conflict had caused the death of more than 250,000 people and thousands of children. The report also documented Yemen's protracted conflict that led to the conscription of children in combat, as well as the death of many thousands of others (ibid, 2). Similarly, Smeulers et al. (2015) used compelling data to rank Iraq, Afghanistan, Nepal, Myanmar and Pakistan among the worst situations for the commission of international crimes, with no motion from the ICC.

However, in November 2017, the OTP requested Pre-Trial Chamber III for authorization to investigate the crimes committed in Afghanistan pursuant to Article 15 of the Rome Statute (ICC, 2017). Prior to these proactive steps, Amnesty International regretted the OTP's indecisiveness in commencing investigations in Afghanistan, 14 years after the conflict, and over 10 years after public pronouncements of the preliminary examination in 2007 (Sacco, 2017).

Conversely, for Côte d'Ivoire, a comparable process did not last for more than a year, while for Afghanistan, it was not until 2013 that the OTP reached the apparent conclusion on the Taliban's, Afghan forces', and the USA's commission of atrocities (ibid, 1). Additionally, the former ICC prosecutor's blog advising the USA on modalities of avoiding the Court's jurisdiction over criminal allegations in Afghanistan manifested impunity for such crimes and questioned the OTP's commitment to victims' justice (ibid).



The ICC's inability to act in other situations, coupled with its prompt responses to some African scenarios, opened it to allegations of an African bias or conflation with neo-colonial intentions. A plausible explanation for the Court's focus on the continent was its attempts at institutional legitimation, and the availability of unable/unwilling situations in Africa that were generally receptive of its jurisdiction.

On the contrary, in other potential situations, such as Israel/Palestine, Afghanistan and Iraq, the ICC was "cautious and restrained" to avoid entanglements with global powers involved in some of the conflicts (Bosco, 2014a). In other situations, such as Kashmir, Syria and Yemen, the Court's jurisdiction was yet to be accepted, hence interventions were only possible under the UNSC's deferral regime.

Nevertheless, the ICC's strategic focus in Africa provided potential entry points for the calculus of domestic political elites that is premised on pragmatic rather than idealistic intentions. This follows a pattern that is consistent with elite-level politics across the globe. In addition, domestic political manoeuvres benefitted from collective actions that are exhibited in regional platforms.

#### **1.4.3. The regional 'solidarity' space**

Given their roles as intermediaries between the international and the local, regional institutions have impacts on the diffusion of ICJ. In this regard, regional institutions constitute elite solidarity groups that either facilitate or resist global governance because of their collective approaches to world affairs (Heatherslow and Lambach 2008, 13). According to Borzel and Hullen (2015, 3), regional institutions owe their importance to mediating agency between nation-states and global institutions. Within the UN system, regional bodies perform complementary roles in global governance via

cooperation frameworks in Chapter VIII of the UN Charter, and many other resolutions of the General Assembly and UNSC (UN, 1999).

For its part, the ICC lists the regional location of its member states as: Africa, Asia-Pacific, Eastern Europe, Western Europe, Latin America and the Caribbean (ICC, 2015a). As of 2015, Africa represented the largest block by ratification, with 34 members, followed by Latin America (27), Western Europe and others (25), Asia Pacific (19) and finally Eastern Europe (18) (ibid).

Apart from the EU, other regional institutions are not enthusiastic about the global ownership of the ICC. This is partly because they do not share, as a matter of principle, the “consolidation of the rule of law and respect for human rights” that the EU members enumerate as their justification for their staunch support for the ICC (EU 2008, 1). The EU promotes the ICC’s universality by supporting the CICC in its campaign for the Rome Statute’s ratification and advancing the human rights agenda (EU, 2008).

The regional body also makes assenting to the ICC a prerequisite for non-member countries in Eastern Europe to be accepted into the Union (Subotic, 2009). The EU is also the largest regional financial contributor to the ICC, in addition to its political and financial support for the ICTR, ICTY, SCSL, STL and the ECCC (EU, 2008). Moreover, the EU was the first regional body to sign a cooperation agreement with the ICC in 2006 (ibid, 20).

Conversely, the AU has emerged as a refuge to some political elites who are apprehensive on the reach of ICJ. As such, some of the continent’s leaders with wanting human rights records have resorted to the AU for protection, proclaimed Pan-Africanism to contest the dividends of ICJ, or pronounced African indifference to the

ICC. For example, Paul Kagame of Rwanda, who has a record of suppressing dissent and human rights violations in the country (Himbara, 2016; Human Rights Watch, 2017a), often speaks against the ICC as an affront on Africa's dignity and sovereignty (see for example, Ngarambe 2013, 1).

In one of his attacks on the ICC, Kagame argued that the Court is openly biased against Africa and "serves only to humiliate Africans and their leaders" (ibid, 1). Perhaps, Kagame's sentiments obtained from his previous experiences with the ICTR. As Louise Arbour, the former ICTR chief prosecutor, reveals, the tribunal was constantly undermined by Rwanda's hostility, hence its inability to prosecute credible cases (Zilio and York 2016, 1). Arbour lamented how the government would "turn on and off the co-operative tap at will," depending on their interests in the court processes (ibid, 1).

Likewise, the former Gambian President, Yahya Jammeh, lashed out at the ICC when announcing the country's intentions to withdraw from the Court in 2016. For Jammeh, the ICC's acronyms denoted: "International Caucasian Court for the persecution and humiliation of people of colour, especially Africans" (cited in Abdouli, 2016). Jammeh criticized the ICC against a backdrop of his autocratic rule that was characterized by repressions, executions, intolerance, tortures and forced disappearances (Barry, 2016). Similarly, with a poor human rights record at home, Libya's Gaddafi spoke of the ICC as Western efforts at recolonization and acts of "First World terrorism" (cited in BBC 2009, 1).

It was therefore not surprising that some of the ICC's accused, such as Bashir in Sudan and Kenyatta and Ruto in Kenya retreated to the AU to bolster their battles with the Court. Also, apprehensive of the ICC's reach, Uganda's President, Yoweri Museveni,

joined in the promotion of Africa's resentment to the Court. In one of the public incidences whereby Museveni rebuked the ICC, he recalled his initial support of the Court, but also the increasing use of the institution by external actors to effect regime change in Africa against leaders that they do not prefer (cited in Siringi and Ongiri 2013, 1).

After collective decisions by many African heads of states, the AU declared regional solidarity on some of the cases facing African leaders, such as in Sudan and Kenya. In so doing, the AU reminded member states about "an imperative need for all of them to ensure that they adhere and articulate commonly agreed positions in line with their obligations under the AU's Constitutive Act" (see for example AU 2014, 2). The Constitutive Act recalls Africa's anti-colonial struggles that were tied with political freedom, economic emancipation, and human dignity. Moreover, the Act established the AU with objectives to, inter alia, consolidate African solidarity and unity, and protect the independence and integrity of member states.

Consequently, the AU passed decisions binding African states on non-cooperation with the ICC to ostensibly protect and safeguard the continent's peace, stability, dignity and sovereignty (AU 2014, 1; AU 2009, 3). The collective decisions resulted in competing obligations between African states vis-à-vis the AU and the ICC. Besides, the decisions positioned the AU as the most visible regional intermediary in undermining the ICC. The AU also filed amicus briefings in some of its cases of interests, notably the Kenyan ones (ICC, 2015).

Moreover, the AU mulled with the idea of creating a criminal chamber within the African Court of Justice and Human Rights (ACJHR), as an alternative to the ICC's

encroachment in the continent. As Murungu (2011) rightly argued, Articles 1 and 17 of the Rome Statute do not envisage conferring complementarity to regional courts, but to national ones. Additionally, the African Court suffers from financial constraints and inadequate political will (The East African, 2015), as these are supposed to be availed by some criminally culpable political actors or leaders who are disingenuous with ICJ. Perhaps, the AU's collective actions against the ICC allude to a Kenyan academic's interpretation that many African states "joined the ICC as a show of public international relations" (Interview, Nairobi, Kenya, 26 August 2015). More worryingly, the collective actions present impetus to domestic political elites with the motives of undermining the ICC in their realms.

### **1.5. Conclusion: not yet a moral universe?**

The ICC's establishment with universal jurisdiction for mass atrocities was a significant step towards the international community's aspirations of constructing a moral universe, in which impunity for mass atrocities is not tolerated. However, the aggregation of this moral universe into spatial hierarchies (international, regional and local spaces), with discrete actors and institutions that have different goals and power positions on ICJ poses a fundamental threat to universality.

Consequently, the challenges expose the Court's interventions to domestic political manoeuvres and the emergence of narratives. Such was the case with the ICC's accusations of selectivity in Uganda, the DRC and Côte d'Ivoire, and the neo-colonial connotations in Sudan, Libya and Kenya.

Notwithstanding the challenges to the universality of ICJ, the idea of a moral universe speaks to the ICC's expressivist function, which points to a more realistic account of what the ICC can achieve. According to Stahn (2012, 279-280) expressivism signifies the ICC's role in the diffusion of accountability norms, generating discourses and warning would be perpetrators on the possibility of their prosecutions. Similarly, Rosenberg (2012) argues that ICJ contributes to the proliferation of norms that abhor atrocities as well as expressivism exhibited in prosecutorial discretions.

As such, the ICC's interventions in Uganda and Kenya articulated the agency of ending impunity for mass atrocities and generated local-international exchanges on the utility of the Court's interventions. To a large extent, politicization of the ICC's interventions obfuscated its contributions to the countries' transition from violence to peace.

The next chapters focus on why and how the ICC's responses to Uganda's northern conflict and Kenya's 2007/2008 were politicized, and ensuing ramifications for contemporaneous TJ discourses. However, these accounts are preceded by discussions of Uganda's and Kenya's efforts at transitions from political violence with a plethora of TJ initiatives, and the ICC's interventions.

## Chapter 2

### **After political violence: a status of affairs in Uganda and Kenya**

The Ugandan and Kenyan authorities utilized TJ discourses as well as the ICC in their articulated efforts to transition from violence towards more sustainable peace. Whereas Uganda's transition involved addressing militarism which led to the northern conflict between the GoU and the LRA, Kenya was attending to the 2007/2008 PEV that was occasioned by long-standing politicization of ethnicity.

Despite the general desire to establish long-term peace in the two countries, some of the TJ mechanisms were inadequately implemented due to conflict complexities and operationalization challenges. Even so, TJ significantly altered the two countries' fragilities, and their absence would probably occasion worse case scenarios. Indeed, Uganda's "steady progress" from militarism and "Kenya after 2007" witnessed considerable institutional re-engineering and attention to efforts to victims' plights. Adding to the TJ mechanisms was the ICC's intervention and its associated expressivism functions.

This chapter discusses the status of affairs in Uganda's and Kenya's transition(s) to more sustainable peace in order to provide the contextual backgrounds for domestic politics, their continuation with the ICC's interventions, and subsequent implications on TJ discourses. In other words, this chapter sets the grounds for further discussions on: why/how the Court's interventions were not immune to politicization in local spaces, and the consequence thereof on peace-building.

This chapter is divided into four parts. The first part discusses the nature and salience of political violence in Uganda and Kenya, and their effects on entrenching societal divisions, human rights violations and democratic backsliding. The second part deliberates on the ICC's contributions to Uganda's and Kenya's peace-building efforts, including its expressivism functions and filling domestic capacity gaps in prosecuting alleged perpetrators of mass atrocities. The third part discusses the ICC's contemporary TJ mechanisms which extended beyond the Court's retribution to building more democratic politics and attending to victims' immediate needs. The chapter then concludes by summarizing the aforementioned arguments and problematizing politicization of the ICC's interventions as symbolized in the narratives (selectivity and neo-colonialism), why they flourish, and their implications for TJ discourses. Generally, these sections provide background information for a better comprehension of arguments that follow in the next chapters of this thesis.

### **2.1. State fragility and political violence**

Since attaining independence from western imperialism, many African states, especially sub-Sahara, have experienced political violence that undermines their stability and populations' well-being. The long list of sub-Sahara African states with violent political episodes since the ICC's establishment in 2002 include: Angola, the DRC, CAR, Chad, Togo, Benin, Nigeria, Niger, Uganda, Kenya, Côte d'Ivoire, South Sudan, Sudan, Togo, Eritrea, Ethiopia, Comoros, Djibouti, Mali, Mozambique, Burkina Faso, Sierra Leone, Burundi, Somalia, Uganda and Gabon (Marshall, 2006; African Development Bank, 2008; Loua and Zounmenou, 2011; Annan, 2014). As the



African Development Bank (2008, ix) sums, there are ongoing conflicts in several African states, many face the threat of violence, while others are recovering.

From an institutionalist perspective, some of the conflict triggers on the African continent include the respective countries' social dynamics and inadequate democratic institutions to mitigate them. Accordingly, the African Development Bank (2008, xv) illustrates that Africa's violence obtains from colonial legacies and democratic deficits within states. Elbadawi and Sambanis (2000, 2) opine that the prevalence of wars in Africa is attributable to a lack of democratic institutions that can manage group dynamics and their associated challenges.

Africa's predicaments date to the decolonization era that is known for few systems of democratic rule and politics of ethnic exclusion. In this vein, Marshall (2006, 2-3) argues that sub-Sahara Africa is a fragile regional sub-system that mainly faces ethnic, communal and revolutionary wars. Moreover, in many sub-Sahara African countries, political violence remains a common occurrence in electoral systems, including where multiparty elections arbitrate political contestations (Fjelde and Hoglund 2014, 297).

Therefore, in many African contexts, violence amplifies the underlying societal pressures, and weakens the institutional mechanisms for their management. This results in "a fragility trap that it is very difficult to escape" (African Development Bank 2008, 8). For instance, Uganda and Kenya did not evade Africa's fragility trap, which culminated in the former's militarism and the latter's elections-related ethnic violence.

For the most part of Uganda's post-independence history, militarism dominated its political processes. This led to substantial democratic decline, long-standing instability and severe human rights violations. During its 20 years of militarism, Uganda was best

known as the only country in East and Central Africa for having had nine presidents since attaining independence (Mayega 2016, 1).

Similarly, Kenya's political system has been far from democratic. This condition is exacerbated by politicization of ethnicity that has been institutionalized for mobilizing popular support, since independence in 1963. Apart from the 1982 failed coup attempt (Mutunga, 2012), the country has followed a different trajectory from Uganda's militarism – namely, elections related violence as witnessed in 1992, 1997, 2002 and 2007 (Oyugi, 2000; Human Rights Watch, 2002; Republic of Kenya, 1999; Republic of Kenya, 2008). Although the 2002 elections violence was much lower in scale, it also accounted for Kenya's enduring violence, which challenges popular perceptions of the country as “an anchor state and oasis of stability” in a turbulent neighbourhood (Mabera 2016, 367).

#### **2.1.1. Uganda's militarism and emergence of the northern conflict**

Uganda attained independence from British colonialism with a fairly representative system of governance as outlined in the 1962 constitution. The constitution established a legislative assembly consisting of elected representatives, and democratic systems of assuming office. However, the country's stability was short-lived, as militarism emerged as an important mode of regulating political succession and modalities of controlling the general population.

Accounting for Uganda's militarism were: the Milton Obote regime of 1962 to 1971, which suspended the constitution and amplified the army's profile in politics; the Idi Amin coup of 1971 and perfection of military authoritarianism; and the overthrow of Amin in 1979 by rebel groups (Karugire, 2003; Adhola, 2012; Refugee Law Project,

2014). After ousting Amin in 1979, the coup architects, who coalesced under the Uganda National Liberation Army (UNLA), reverted Uganda to several civilian administrations that laid the foundation for a return of civilian rule (ibid).

Consequently, elections were scheduled for 1980 as part of restoring the country's democratic process. Organized by the Military Commission (MC), the 1980 elections drew the participation of Obote's United People's Congress (UPC) party, Museveni's Uganda's Patriotic Movement (UPM), Paul Ssemogerere's Democratic Party (DP) and Mayanja Nkangi's Conservative Party (CP) (Daily Monitor, 2012; Mugabe, 2016; Kalyegira, 2016). After the final tally of the elections results, the MC declared Obote the winner of the presidential race, in addition to UPC's majority in the National Assembly.

The elections results were however contested by some of the presidential candidates, with allegations of fraud and irregularities. As Kalyegira (2016, 1) contends, the disputed 1980 election provided incentives for some political and military groups to rebel against the regime. There were also arguments of how the election marked a critical turning point in Uganda's political history: planned to revert democratic rule, it was undermined by widespread irregularities and resulted to a catastrophic civil war (Daily Monitor 2012, 1).

Museveni's guerrilla warfare posed the most significant threat and opposition to Obote's second reign. Museveni had made it clear during the 1980 election campaigns for UPM that he would go to the bush in the event there was rigging (Museveni, 1993). Fighting under the NRA/M, Museveni and his soldiers launched their operations from

the Luweero triangle, a stretch north of Kampala, from which they fought the government's UNLA (Musisi, 2013).

As a result of the war, many people were killed, and thousands were forcefully displaced, in addition to other forms of human rights violations. As of 1984, Human Rights Watch (1999) documented approximately 100,000 to 200,000 civilian deaths in the Luweero triangle. Moreover, a survivor recollected how "the two groups killed people indifferently in large numbers and used different methods" (cited in Musisi 2013, 1). Some survivors also provided accounts of the government's "butchering of every human living thing they came across, looting and torching property" (ibid, 1). Additionally, the rebels recruited child soldiers, enforced disappearances of perceived government supporters and killed civilians for their cattle, property and food gardens (ibid). As one victim stated, for the rebels, their "signature killing method consisted of blindfolding people, stripping them naked, and then hacking them one by one to death using axes and spears, among others" (ibid, 1).

Before the NRA/M succeeded in overthrowing the government, a military junta, led by General Tito Okello Lutwa, ousted Obote in July 1985 (Kakembo and Ogwang, 2012). Equally, the Lutwa regime was deposed by the NRM in January 1986 before establishing its foothold in the country (ibid). Similarly, the NRM had to contend with military opposition from several rebel groups, which operated from the west and north of the country.

From the west, the NRM fought Uganda National Rescue Front (UNRF), UNRF II, West Nile Bank Front (WNBFF) and Allied Democratic Forces (ADF) (Amnesty Commission, 2013). Thereafter, the UNRF and UNRF II agreed to peace settlements

with the NRM in 1986 and 2002 respectively, while the WNBF suffered military defeats in 1997 (ibid, 6-7). For its part, the ADF retreated to Eastern DRC in 1995 due to military offensives from government forces (Cullen 2017, 121).

On the northern front, the NRA/M battled former UNLA soldiers who withdrew to the region and Sudan to form Uganda's People's Democratic Army (UPDA) (Refugee Law Project, 2014). Given the UPDA's concentration in Acholiland, the NRA/M's counter offensives were focused in the region, which led to antagonisms between the regime and the local populations, and the latter's distance from the GoU.

Whereas some UPDA soldiers agreed to a peace settlement in June 1988 and joined the NRM regime, others opted for an emerging peasant rebellion – Alice Lakwena's Holy Spirit Mobile Forces (HSMF) (Refugee Law Project, 2014). After Lakwena's defeat in 1987, the HSMF was led by Lakwena's father, Severino Lukoya, who surrendered to the government in 1989 (Ocungi and Ayug, 2017). Subsequently, Joseph Kony, initially a member of the HSMF and Lakwena's relative, took over the reins of the northern rebellion under the LRA (Refugee Law Project, 2004).

Collectively, the northern insurgencies were fuelled by the NRM's atrocities, and fears of national marginalization (ibid, 4). As a member of the Acholi community noted, the war transformed from its initial rebellion of former UNLA forces to include revenge attacks against the general population (Interview, Kampala, Uganda, 27 January 2016). A study by Human Rights and Peace Center (HURIPEC) and Liu Institute for Global Affairs (LIGA) (2003, 43) opines that the regime's pursuit of former UNLA soldiers was conflated with attacks on civilians in the Acholi region. After Museveni's

consolidation of his rule over the country, the NRA morphed into Uganda People's Defence Forces (UPDF).

Lasting for over two decades, the northern conflict led to an enduring humanitarian crisis, which was manifested in thousands of child abductions, mutilation of victims, forced displacements of populations and sexual and gender-based violence (SGBV). In many occasions, the LRA abducted children, whom they used as soldiers, porters and sex slaves (Cakaj, 2016). They also mutilated some of their victims by cutting their lips, noses, ears, hands and breasts as a form of retribution for their alleged support for the government (Cakaj, 2016; Storr, 2014).

In 2004, Jan Egeland, as the UN's under-secretary general for humanitarian affairs and emergency relief, described the conflict as "the biggest neglected humanitarian emergency in the world ... and a moral outrage" (cited in The Guardian, 2004). Egeland illustrated that the conflict was unique in the world, as there was nowhere else where 80 percent of the rebel fighters were children, and 90 percent of the population had been forcefully displaced from their homes (ibid). As Human Rights Watch (2005, 2) documented, the war led to the displacement of more than 1.9 million people, who were confined in camps from which they were vulnerable to attacks and abuses by the UPDF and the LRA.

Besides the ensuing atrocities, the northern conflict exacerbated societal divisions along the traditional north-south dichotomies, which predated colonialism. Sentiments of the north-south divide were common references to the northern conflict and its predecessor – the NRM and UNLA war of 1981 to 1986. In retrospect, British

colonialism had built on pre-colonial differences between the southern (Bantu) and northern (Nilotic) regions, as part of its divide and rule policy.

Under colonialism, southern regions (Buganda, Ankole and Busoga) were designated for growing cash crops and as administration centres, whereas northern districts of Acholi, Madi, Padhola, Teso and Langi were labour reserves and recruitment centres for army, police and prison jobs (Refugee Law Project, 2014). As a result, the north emerged as underdeveloped in relation to the south, but with an over-representation in the army. In this vein, militarism evolved amidst ethnic nationalism and regionalism, which exacerbated Uganda's artificial creation (Karugire 2003, 49).

With ethno-regional divisions as conflict fault lines, the NRM emerged as a southern dominated group, albeit with strong anti-northern sentiments. Some southern elites were opposed to the north's domination of the country's army and by extension, politics. Since attaining independence, Uganda had been led by Obote, Amin and Okello (all northerners), to the chagrin of some southern elites. As HURIPEC and LIGA (2003, 11) revealed, the NRA/M leadership believed that 'northern' domination of the country's politics was not tenable and had to be stopped. For example, in one of Museveni's public addresses in 1985, he argued that northerners dominated leadership positions since independence in 1962, as southerners played peripheral roles (ibid, 34).

Likewise, a Baganda researcher who followed Uganda's political developments observed that Museveni used the Bantu identity to maximize on the perceived north-south divide as legitimation for his rebel group (Interview, Kampala, Uganda, 25 January 2016). Specifically, his strategies included: enlisting university graduates,

gimmicks of restoring the Baganda Kingdom, and forging alliances with some Baganda rebel groups (ibid).

In line with the conflict's appeal to the north-south dichotomy, there were celebrations amongst some Bantus after the NRA/M's rise to power in 1986. More concretely, there was a great relief and feeling amongst the southern Bantu tribes that it was the commencement "of sanity and return to innocence for Uganda" (Kalyegira 2011, 1). Furthermore, Baganda *kadongo kamu* folk singers praised the NRA's victory, with clear messages that it was northerners, and not the national army, that were defeated (ibid).

Besides, the NRM's post-revolutionary legitimacy strategies incorporated the instrumental use of the material remains of the Luweero triangle. By designating the Luweero skulls and bones as the official accounts of Uganda's war history, the NRM distinguished previous northern regimes as perpetrators of the atrocities, and the regime as peace agents (Bernard, 2017).

Utilized after the 1986 coup and in subsequent elections, the strategy consolidated the regime's legitimacy, especially in the south, and alienated northerners. As such, the Luweero tragedy emerged as the NRM's platform for delegitimizing political opponents by fostering ethno-xenophobia and fostering its legitimacy in equal measure (Adyanga 2015, 390). Specifically, northerners were framed as enemies of the rest of Ugandans, in addition to the killing of many Acholi in Buganda (HURIPEC and LIGA 2003, 32). An Acholi elder recalled that northerners were collectively accused for the Luweero killings, making life generally unbearable for them (Interview, Gulu, Uganda, 22 March, 2016). Similarly, a northern based human rights activist revealed that



victims in Luweero triangle still remember what they went through, blame northern soldiers and are still bitter against people in the north (Interview, Gulu, Uganda, 30 March, 2016).

Beyond national boundaries, the northern conflict attracted the participation of Sudan and the USA, which reduced the incentives for mediation. Sudan joined the war on the LRA's side as retaliation for Museveni's support for the Sudan People's Liberation Army (SPLA) that was fighting for autonomy from Khartoum (HURIPPEC and LIGA, 2003). For its part, the USA sided with Museveni after his conflation of the insurgency with terrorism, at the time of 9/11 when the USA intensified war on terror (ibid).

Thereafter, the GoU intensified military offensives against the LRA under 'Operation Iron Fist' in 2002 and 'Operation Lighting Thunder' in 2008. In turn, the LRA increased attacks in Acholiland, Teso, Madi and Lan'gi regions, and in parts of South Sudan, Eastern DRC and CAR (Cakaj, 2016). After intense local and international lobbying, the GoU and the LRA agreed to mediation in Juba, South Sudan, between 2006 to 2008.

However, the peace talks finally collapsed in December 2008 after Kony failed to appear at the final signing ceremony (Hendrickson and Tumutegereize 2012, 5). As a result, the LRA proceeded to CAR, South Sudan and Eastern DRC, from which they continued committing atrocities on civilian populations (Human Rights Watch, 2009; Amnesty International, 2011). Conversely, northern Uganda remained relatively peaceful as the rebels scaled down their operations in the country. As Uganda was emerging from several years of military conflicts, Kenya was reeling under politicization of ethnicity, which laid the ground for the 2007/2008 PEV.

### **2.1.2. Politicization of ethnicity and Kenya's 2007/2008 political crisis**

The 2007/2008 PEV was reportedly the worst incidence of political violence in Kenya's post-independent history because of its threat to the country's existence as a unitary state. Building from the closely contested presidential elections of 2007, the PEV obtained from the polarized political environment that the incumbent's Party of National Unity (PNU), and the opposition's Orange Democratic Movement (ODM) party had orchestrated. Accordingly, the African Peer Review Mechanism (APRM) had revealed that Kenya demonstrated triggers of civil strife, namely: ethnic schisms, polarized political discourses, widening inequality and poverty levels and entrenched corruption (NEPAD 2006, 14).

Following the Electoral Commission of Kenya's (ECK) announcement of Kibaki's controversial win, some sporadic violence erupted in the opposition's strongholds. The forms of violence intensified and evolved after Odinga and his ODM party rejected Kibaki's win, citing irregularities in the tallying process (Mugonyi, 2007; Daily Nation, 2013a). The ODM party resorted to the streets, citing their lack of faith in the judiciary's ability to act as a neutral arbiter, and the perception that the institution was filled by Kibaki loyalists (Dagne 2011, 9).

As the violence escalated, the country's delicate mosaic of fragmented ethnic nationalities was at the risk of obliteration. Fought along ethno-regional patterns which accounted for voting behaviour, the PEV exposed Kenya's façade of alignment to democratic ideals, as opposed to the reality of a dysfunctional state (Interview, human rights activist, Nairobi, Kenya, 9 October 2015). Many PNU supporters from the Kikuyu and other Mt. Kenya communities (Embu and Meru) were targeted in ODM's

strongholds in the Rift Valley, Nyanza, Western, Nairobi and Coast (Kanyinga, 2011). In a similar vein, perceived ODM supporters from the Luo, Kisii, Luhyia and Kalenjin communities, were attacked in PNU strongholds in Central, Rift Valley and Nairobi (ibid). As further indications of the deep ethnic resentments that the PEV ignited, there were remote considerations for Odinga's swearing in, or even the country's division along the 2007 voting patterns.

The Commission of Inquiry into the PEV (CIPEV) revealed that almost half of the violence was perpetrated by state security forces, besides the participation of a Kikuyu dominated *Mungiki* militia that took part in revenge attacks (Republic of Kenya, 2008). Additionally, the Kenya National Commission on Human Rights (KNCHR) documented the violence and illustrated its widespread nature, alleged perpetrators and incidents of human rights violations. The KNCHR (2008, 7-9) revealed that the PEV affected nearly 136 constituencies in six of the eight former provinces; involved organized attacks and counter attacks; resulted in over 1,162 deaths, destruction of property and commission of international crimes. According to the government estimates, nearly 663,921 people were displaced from their homes, and approximately 350,000 people sought refuge in temporary camps, while the rest were integrated in local communities (Lynch 2009, 604).

Instructively, the 2007/2008 PEV was to be understood in the context of prolonged land rights conflicts, recurrent violence and persistent impunity and economic inequalities (OHCHR 2007, 5). These underlying issues were exacerbated and triggered by "the use of socially salient ethnic identities for political mobilization" or politicization of ethnicity (Weber and Flesken 2016, 2). In short, the post-2007 political

environment obtained from the party formations of PNU and ODM that were coalitions of “convenience and commitment,” that had failed to address ethnic divisions despite their incorporation of diverse communities (Elischer, 2008).

During the 2007 elections campaigns, both PNU and ODM utilized strong political rhetoric in mobilizing their supporters. A former ODM chief strategist revealed that they coined the slogan “One against 41,” to ostensibly rally popular support and alienate the Kikuyu from the rest of Kenyans (Miguna 2012, 171). As the strategist further noted, their game plan was to spread hate against the Kikuyu and pose the question whether the electorate were comfortable with another Kikuyu presidency after Kenyatta and Kibaki (ibid, 172). Additionally, a former ODM official disclosed that there were war cries in their political rallies, with some politicians openly declaring war against perceived enemies – the Kikuyu (Interview, Kisumu, Kenya, 5 November 2015). Likewise, part of PNU’s strategies included verbal attacks on ODM’s leaders that were premised on ethnic prejudices (International Crisis Group 2008, 5).

As a result of the incitements, violence erupted in some parts of the country even before the elections. For example, in the Rift Valley, confrontations between different ethnic groups led to over 200 deaths and approximately 70,000 displacements (Human Rights Watch 2008, 19). Given the polarized political environment, weak institutional infrastructure, and Kenya’s association of social mobility with political power, the 2007/2008 PEV was predictable. Hence, as Mueller (2008, 2002) rightly argued, the election was anchored on the politics of ethnic exclusion, as well as competition over access to state power and subsequent control of resources.

Revealing an enduring conflict, the 2007/2008 political violence followed similar patterns of ethnic violence in Kenya's political moments: the general elections of 1992, 1997 and 2002, and the 2005 constitutional referendum. Although the 2002 election is often proclaimed as peaceful, there were instances of violence during party primaries, and in the build up to the general election (Astill, 2002; BBC, 2002). Towards the elections, there were reports of violent parliamentary by elections in 2001; police crackdowns on government critics; gang attacks on opposition rallies and sporadic violence between the government and opposition supporters (Human Rights Watch 2002, 6).

Besides, numerous efforts at fostering a national identity have been unable to overcome Kenya's durable ethnic conflicts (Hornsby 2011, 2). Whereas the conflicts originate from elite survival tactics, state excesses, poverty and land rights, resort to violence follows its own form (ibid, 2). Likewise, the eviction of some communities and ensuing emergence of an Internally Displaced Person (IDP) identity manifests the persistent conflict that links to politics of representation and historical narratives (Mwakimako and Gona 2011, 25). Similarly embedded in Kenya's endemic conflicts are articulations of grievances and conflict legitimization by antagonistic parties (ibid, 25). Moreover, as Lynch (2011, 2) rightly posits, Kenya's politics of ethnicity promotes notions of inter-communal differences and competition, which can evolve into violence under conditions of anger, elite inspiration, and inadequate institutional checks.

Perhaps, the longevity of Kenya's ethnic violence is attributable to the foundation of the state as established by the Kenya Africa National Union (KANU), that ruled the country for an uninterrupted period of 39 years after independence. Over this duration,

KANU established an authoritarian and neo-patrimonial state; which exhibited suppression of political pluralism, personal rule, ethnic exclusion and repression of freedoms (Hornsby and Throup, 1992; Brown, 2001).

Succeeding Jomo Kenyatta after his death in 1978, Daniel arap Moi perfected the ills of his predecessor's rule, under the slogan *Nyayoism*, or following footsteps. Following in, and deepening Kenyatta's footsteps, Moi perfected the use of clientelism, patronage and ethnic favouritism in public life (Ajulu 2002, 263; Branch and Cheeseman, 2008). Although Moi expanded patronage to several regional elites for national support, the bulk of his attention was on his Kalenjin community (Ajulu, 2002). Partly illustrating the neo-patrimonial state that Kenyatta built and Moi perfected, Kenyatta resettled the poor Kikuyu in the former white settlements that were historically owned by the Kalenjin and Maasai (Lonsdale 2008, 1). For his part, Moi satisfied his Kalenjin community by creating for them an ethnic elite, from which some of them had access to patronage (ibid).

Confronted with popular demands for political pluralism in the early 1990s, the Moi regime opted for violence against civil society activists, vocal clergy, and opposition politicians. With the repeal of section 2 (a)<sup>4</sup> of the constitution and subsequent multiparty elections in 1992, some KANU elites from the Rift Valley instigated violence in the region as a political strategy to disenfranchise perceived opposition supporters and consolidate Moi's support (Republic of Kenya 1999, 49; Human Rights

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<sup>4</sup> Section 2(a) of the constitution had outlawed multiparty politics. It was repealed after domestic and international pressure on the KANU regime.

Watch 2002, 5). Under the guise of majimboism (regionalism), the KANU elites promoted ethnic exclusion and stigmatization, whose climax was the eviction of, and attacks on the Kikuyu, Luo, Luhya and Kisii communities in the Rift Valley (Ajulu, 2002). The violence was also strategically used by the KANU elites to discredit multiparty politics as a divisive political system (Republic of Kenya, 1999).

Similar incidences of ethnic violence occurred during the 1997 elections in the Rift Valley and some parts of the coast (ibid). Despite the formation of a judicial commission of inquiry into the tribal clashes (ibid), no formal prosecutions followed, due to institutionalized impunity for the KANU politicians who sustained and benefited from the system.

Notwithstanding the incidents of violence in 2002, the election was generally hailed as Kenya's revolutionary moment. A nationwide elite consensus – National Rainbow Coalition (NARC) – that campaigned on a platform of institutional reforms, fundamental change and providing redress to historical injustice, ended Moi's 24-year misrule. NARC was led by Mwai Kibaki, who assumed the presidency after forming a government.

In spite of NARC's impressive performance towards economic growth and government effectiveness, Kenya's ethnic and institutional problems lingered on (Hornsby, 2011). NARC's numerous promises were subsumed by a strong pull towards status quo (Oucho (2008, 8). Soon after assuming power, president Kibaki abandoned plans to provide redress to historical injustices, propounded Kikuyu hegemony in political and economic realms, and introduced an unpopular draft constitution during the 2005 constitutional referendum (Barkan, 2007). Additionally, the referendum campaigns

were characterized by divisive ethnic mobilization and hate speech, which outshone the constitutional review process (KNCHR 2006, 37).

Significantly, the post-referendum period witnessed the fragmentation of the NARC, especially after Kibaki dismissed Raila Odinga and other leaders who campaigned against the constitution from the cabinet. Hence, for the most part of Kibaki's rule, there were increasing demands for power sharing, as ethnic tensions over economic resources resurfaced (Hornsby 2011, 14). Subsequently, the dissatisfied Luo, Kalenjin, Luhya, Kisii and coastal communities and their leaders coalesced in ODM that successfully campaigned against the draft constitution.

Towards the 2007 elections, ODM was transformed into a political party under Odinga's (Luo) leadership. Other prominent figures in ODM included: Musalia Mudavadi (Luhya), William Ruto (Kalenjin), Joseph Nyagah (Embu), Najib Balala (coast) and Charity Ngilu (Kamba). Thus, ODM emerged as a "broad anti-Kikuyu alliance" which rendered a 'high-stakes' election (Branch and Cheeseman 2008, 18). For their part, the Kikuyu elites formed PNU as Kibaki's new re-election vehicle. Additionally, the KANU chairman, Uhuru Kenyatta, dropped his presidential ambitions and joined Kibaki's campaign in solidarity with his co-ethnics.

A 41-day mediation process, under the auspices of the AU and Eminent African Personalities, restored relative peace and stability in February 2008. Led by Kofi Anan, with the participation of PNU and ODM representatives, the Kenya National Dialogue and Reconciliation (KNDR) process culminated in the 'Agreement on the principles of partnership of the coalition government' (Kaye and Lindenmayer, 2008). According to the text of the agreement, "neither side could realistically govern the country without



the other,” which prompted the necessity of a power sharing government (Republic of Kenya 2008a, 1).

The government and the opposition finally agreed to the National Accord and Reconciliation Act (2008) that gave effects to a transitional PNU/ODM coalition government. The Act established the position of Prime Minister (Odinga), two deputies (Kenyatta and Mudavadi) and provisions for sharing cabinet portfolios amongst the coalition partners. Kibaki retained the Presidency.

Moreover, the transitional government committed to a raft of reforms, comprising: constitutional, institutional and legal reform; land reform; addressing poverty, inequity and regional imbalances; unemployment, particularly among the youth; and consolidation of national cohesion and unity (Republic of Kenya, 2008b). The various reform platforms envisaged the establishment of a Truth, Justice and Reconciliation Commission (TJRC), and a number of other commissions of inquiry.

Besides the inclusion of various TJ mechanisms in Kenya’s and Uganda’s transitions from conflict to peace, ICJ was also in the recipes of domestic authorities, given structural challenges in commencing criminal accountability for atrocities. Taken together, the ICC’s interventions and TJ discourses steered the two countries towards democratic consolidation, victims’ centeredness and national healing and reconciliation.

## **2.2. Domestic imports of international criminal justice**

For the Ugandan and Kenyan people, the ICC’s establishment in 2002 was timely. This was due to the potential of, and the eventual outbreak of violent conflicts, as well as

the subsequent demands for criminal accountability by some victims and affected communities. Indeed, the ICC was envisaged to decipher domestic conundrums on holding alleged perpetrators of mass atrocities, with the long-term aim of guaranteeing non-repetition.

During Uganda's northern conflict, some victims and affected communities supported criminal prosecution of alleged perpetrators of the atrocities they suffered. According to survey results, 76 percent of directly and indirectly affected victims in the north supported criminal accountability (Pham et.al 2005, 26). Probed further on who was to be held accountable for the violence, 37 percent of the victims opted for the LRA leadership, 29 percent preferred the LRA in general, 16 percent believed that the GoU was to be held accountable, and 7 percent selected the military (ibid).

However, there were disparities in calls for justice between the Acholi and their Lan'gi and Teso neighbours. Whereas the Acholi had a prominent role in the conflict due to their significant proportion of both victims and perpetrators, and proximity to the LRA, the Lan'gi and the Teso had low affinities to the rebel claims of waging rebellion. Therefore, "respondents from non-Acholi districts were three times more likely to believe someone should be held accountable than the Acholi districts" (ibid, 26). In this regard, support for criminal trials stood at 44 percent in Gulu (Acholi), 61 percent in Kitgum (Acholi), 88 percent in Lira (Lan'gi) and 68 percent in Soroti (Teso) (ibid).

Similarly, in Kenya, there was considerable support for criminal accountability in the immediate aftermath of the 2007/2008 PEV. This obtained from the fresh memories of the violence, its historical recurrence and a need for non-repetition. Accordingly, the KNDR monitoring survey revealed that Kenyans generally supported the prosecution

of alleged perpetrators of the PEV (South Consulting 2010, 6). Specifically, the national average in support for criminal justice stood at 57 percent, with Central (Kikuyu) recording 55 percent, Nairobi (cosmopolitan) 75 percent, Kisumu (Luo) 46 percent, Eldoret (Kalenjin) 48 percent and victims, 75 percent (ibid, 42).

Despite the demands for criminal justice in both Uganda and Kenya, there was little motion in national institutions towards this end. In contrast, many TJ mechanisms were unfolding in both countries, such as: constitutional writing, institutional reforms, truth telling, traditional justice, reparations and reintegration.

In Uganda, prospects for prosecuting alleged perpetrators of the northern conflict were undermined by an old tradition of amnesty as a conflict management framework. In this regard, Afako (2002, 67) argues that Uganda deployed *de facto* and *de jure* amnesties to groups which were engaged in rebellion (ibid, 65). For example, the Amnesty Statute of 1987 encouraged cessation of insurgencies and was generally targeted at Ugandans in exile who feared prosecution at home (ibid). The 1987 amnesty law excluded crimes of genocide, murder, kidnapping and rape, which were considered heinous. Similarly, the Amnesty Act of 1998 outlawed certain offences, and it was succeeded with the Amnesty Act of 2000.

For its part, the Amnesty Act of 2000 was predicated on comprehensive exoneration, out of concerns that any threats of prosecutions would jeopardize peaceful resolutions to the northern conflict (Afako 2002, 66). In support of the amnesty law of 2000, the GoU claimed that it was, “an effort to draw upon community values of reconciliation in the service of conflict resolution” (Republic of Uganda 2013a, 31). The GoU also argued that amnesty was part of African values, which ought to be supported “at the

international plane” by Africans, both collectively and at the individual level (ibid, 31).

As such, the GoU argued that the promotion of amnesty and African norms would inform the development of international law, and accord them authority (ibid, 31).

Departing from Uganda’s dialectic of whether to succumb to international norms and abandon amnesty, Kenya was battling institutionalized impunity for the power elite, who are critical actors in violent episodes (Anderson, 2002; Waweru, 2008). More significantly, domestic voices on criminal justice were under threat from pro-impunity attitudes that are commonly expressed in phrases such as ‘forgiving,’ ‘forgetting’ and ‘moving on’ (see for example Musila 2014, 257).

It is however important to note that despite Kenya’s impunity, some low-level suspects faced justice in local courts and were eventually convicted. For example, Human Rights Watch (2011a, 39) provides an account of some cases which were investigated and prosecuted at the High Court of Kenya. Even so, the organization decried poor quality of investigations, incompetence on the part of prosecutors, corruption, and police reluctance to try their colleagues (ibid, 5). Many suspects who were in police custody also benefited from earlier calls for amnesty by a section of the political elites from ODM (Daily Nation, 2008).

Kenya’s impunity gap was further widened by the political leaderships’ failure to follow through the recommendations of the CIPEV or the Waki commission.<sup>5</sup> The CIPEV was created in early 2008 by the coalition government to conduct investigations

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<sup>5</sup> The CIPEV became popularly known as Waki commission, from the name of its chairman, Judge Philip Waki.

into alleged roles and responsibilities of various actors and institutions into the violence, and recommend appropriate actions (Republic of Kenya 2008c, vii).

As a result, the CIPEV found evidence of 1,133 deaths, 3,561 injuries and destruction of 117,261 and 491 private and government properties, respectively (ibid, 346). It also revealed instances of sexual violence, in the form of ethnically driven gang and individual rapes, and female and male genital mutilation (ibid, 348). Moreover, the CIPEV established that the police used excessive force, and engaged in criminal behaviour, such as murder, gang rape and looting (ibid, 396).

The commission went further to recommended the establishment of the Special Tribunal for Kenya, in order to commence criminal proceedings against some of the most responsible perpetrators of the violence (ibid, 472). For compliance with this recommendation, the commission suggested the ICC's intervention in the event of domestic inability/unwillingness. It also recommended: fast-tracking the International Crimes Bill of 2008; utilization of the Witness Protection Act of 2008; enactment of the Freedom of Information Bill; suspension of public officials charged with criminal offences related to the violence, and their excusal from holding public office upon conviction (ibid, 476).

Notwithstanding the commission's recommendations, there was inadequate political will towards criminal accountability. As Musila (2009, 450) observed, the PNU and ODM transitional government "wavered on its position over time." More so, Kenyatta's and Ruto's allies thwarted efforts to establish the tribunal in the National Assembly with the slogan 'don't be vague, go to The Hague.' As Brown and Sriram

(2012, 225) rightly argued, their public support for either the tribunal or the ICC changed over time, and support for one shifted when the other seemed to be a reality.

In view of Uganda's inability to prosecute alleged perpetrators of the northern conflict, the ICC's role was considered. This commenced with the GoU's referral of the LRA to the ICC in January 2004, and the OTP's subsequent investigations from July that year (ICC, 2004a). As a result, the OTP found evidence of war crimes, including: attacks on civilian populations, murder, rape, enslavement of children and inhumane treatment of victims (ibid). The OTP's charge sheet also had crimes against humanity, namely: slavery, rape, and other inhumane acts (ibid).

Subsequently, in October 2005, the ICC's Pre-Trial Chamber Judges issued warrants of arrest against five LRA senior commanders: Joseph Kony, Dominic Ong'wen, Okot Odhiambo, Vincent Otti and Ras Lukwiya (ICC, 2005b). As of today, Ong'wen continues to face trials at the ICC after his surrender in CAR in January 2015, while the rest of the suspects are deceased, apart from Kony who is still on the run (Burke, 2016).

For Kenya's indecisiveness on trials for the 2007/2008 PEV, the OTP submitted a request to Pre-Trial Chamber II for authorization to open investigations in November 2009 (ICC, 2009b). In its application, the OTP relied on selected public reports, the CIPEV, as well as local and international NGOs (ibid). The Prosecutor received 30 communications from several groups and individuals on the nature of crimes within the Court's jurisdiction (ibid). According to the OTP, the PEV amounted to international crimes, such as: "elements of brutality, burning victims alive, attacking

places sheltering IDPs, beheadings, and using pangas and machetes to hack people to death” (ICC 2017c,1).

In March, 2010, the OTP’s request was granted, after which six individuals or the ‘Ocampo Six,’<sup>6</sup> were named as the most responsible perpetrators, in December that year. The list of suspects comprised an equal number of individuals from PNU and ODM parties. From the PNU side were: Kenyatta (deputy prime minister and minister for finance), Francis Muthaura (head of civil service) and Mohammed Hussein Ali (police commissioner). The ODM suspects included: Ruto (minister for education), Henry Kosgey (minister for industrialization) and radio journalist Joshua arap Sang (ICC, 2010). Besides their government positions, Kenyatta was an important politician amongst the Kikuyu,<sup>7</sup> whereas Ruto and Kosgey were senior Kalenjin politicians.<sup>8</sup>

By intervening in Uganda and Kenya, the ICC overcame local difficulties in investigating and prosecuting perpetrators of serious atrocities. In so doing, the Court’s entry in to the two countries intensified the debates on, and a need for criminal accountability for the conflicts. Of great significance were the possibilities of domestic

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<sup>6</sup> The six suspects became famously known as ‘Ocampo Six’ after the media’s reference.

<sup>7</sup> As the son of Kenya’s founding president, chairman of KANU and potential presidential candidate.

<sup>8</sup> This obtained from Ruto’s membership in ODM’s pentagon (highest decision-making organ in 2007), and Kosgey’s position as ODM’s national chairman.

transfers of the ICC's normative imperatives; such as complementarity, victim centeredness and international cooperation. Indeed, the Court's expressivist function added to other local conflict resolution frameworks and TJ initiatives.

To more optimistic commentators, the ICC's involvement in Uganda and Kenya directly contributed towards peace. For example, in Uganda, it has been argued that the Court's indictments of five senior LRA commanders pushed them to peace talks at Juba (Dareshori and Evenson 2010, 2; Meron, 2011). These claims are however contested, as the GoU's military offensives against the LRA could also account for their consent to negotiations. Some observers argue that the LRA's decision to participate in the peace talks was a tactical manoeuvre to strategize, given their weak position at the time (Interview, human rights activist, Kampala, Uganda, 3 February 2016). During the LRA's engagement in the talks, they "had been very weak, lost many people after the Iron Fist, lacked arms and medicine, and were internally disorganized" (ibid).

Perhaps, what is clear is that the ICC's intervention in the Ugandan situation expressed the international community's consensus on criminal accountability, as well as domestic signals to would be perpetrators that they stand chances of accounting for their crimes. Additionally, the trials met some of the victims' demands for criminal accountability, going by the survey results in which most victims singled out the LRA for retribution. Moreover, Louis Moreno Ocampo, the then ICC prosecutor, argued that his motivation for intervening in the conflict was guided in part by the victims' interests and local efforts towards justice (ICC 2005c, 4-5).

In Kenya, the ICC's intervention was partly credited for contributing to the relative peace that was witnessed in the 2013 general elections. For example, a human rights



activist observed that despite the ICC's limitations, it somehow scared some political elites who would have instigated violence (Interview, Nairobi, Kenya, 2 March 2016). Similarly, a peace activist in the Rift Valley narrated how, the relative peace in the elections benefited from the ICC system, because of internal fears that some agencies could be collecting evidence of perpetrators (Interview, Eldoret, Kenya, 3 November 2015).

Likewise, Ocampo claimed credit for the relatively peaceful elections, arguing that the ICC's course of action was a 'game changer' (Luce, 2013). Ocampo's arguments were reiterated by Anton Steyberg from the OTP, who noted that the ICC's focus, together with other factors, were deterrence in the elections (cited in Daily Nation 2017, 1; Musau, 2017).

There were also arguments that the ICC's intervention in Kenya was a significant step in departing from Kenya's impunity, to more appreciations of the rule of law. In this vein, a former senior government official suggested that the appearance of prominent Kenyans for trials, "sent an important message to everyone in Kenya – the rich, poor, powerful or powerless alike – that crime does not pay" (Miguna 2012, 406). He also argued that the ICC trials showed that nobody is immune to accountability, and that justice is not limited by time constraints (ibid, 406). For his part, a human rights activist argued that the ICC was a manifestation of impunity check and a safeguard for the rule of law that many generations of Kenyan leaders had failed to deliver to the country (Wainaina 2016, 1).

Nevertheless, the aforementioned claims are contested due to the difficulties in inferring causality, and disagreements on the ICC's deterrence effect (Furman, 2013;

Snyder and Vinjamuri, 2015). The outcome of the Kenyan cases (politicization, premature termination and a mistrial) also challenged some of the positive attributes on the ICC's intervention.

Evidently, the ICC's entry in Kenya shaped domestic debates on accountability for mass atrocities. In so doing, the Court presented more feasible possibilities of holding alleged perpetrators of violence to account; as opposed to the country's guarantees of impunity for the power elites, and the mantras of 'forgetting,' 'forgiving' and 'moving on'. Moreover, as Ocampo revealed, the Kenyan precedent would send a signal to more than 15 African states that were to hold elections in the next one and a half years that commission of international crimes would invite the ICC's response (Kanina 2010,1).

Collectively, the ICC's interventions in Uganda and Kenya added to the contributions of domestic TJ mechanisms towards more sustainable peace. Essentially, TJ discourses which went beyond criminal accountability, and provided avenues for deepening democracy, addressing victims' needs and fostering reconciliation.

### **2.3. From conflict to democratic peace?**

The ICC's interventions in Uganda and Kenya built upon domestic successes with TJ mechanisms, which significantly altered the conflict scenarios. For example, the two countries adopted new constitutions with more democratic guarantees; reformed their institutions, such as the judiciary; attended to victims' plights with reparations and reintegration; and attempted truth-telling initiatives.

Besides, the countries adopted other forms of departing from the past. These included Uganda's memorialization projects, *ad hoc* monetary compensations, some

resettlements, as well as development, recovery and peace efforts in the north (Hopwood, 2011; Republic of Uganda, 2013). In Kenya, many local and international organizations embarked on a plethora of peace-building activities amongst communities that were affected by the 2007/2008 PEV (Interview, peace activist, Nairobi, Kenya, 27 October 2017).

In spite of the transformation potential of TJ mechanisms, domestic authorities departed from their full implementation, due to a confluence of factors. These comprised the complexities of the conflicts, financial and logistical challenges, official complicity in some forms of the violence, and complacency after war termination. In this regard, Mihr (2017, 115) rightly argued that the outcome of TJ mechanisms significantly depends on the aims and agendas of actors, as well as their application by social institutions and political elites.

More importantly, conflict complexities rendered TJ a difficult endeavour to undertake in both countries. To illustrate, the longevity and evolution of Uganda's northern conflict led to new dynamics, namely: construction of narratives and counter narratives, involvement of international actors, and conscription of child soldiers. In this vein, Woodward (2007, 164) concludes that war alters societies, interests and the economy, notwithstanding its justification along political differences or behavioural patterns.

For Kenya, the 2007/2008 PEV was interconnected with historical land injustices in the Rift Valley, and long-standing questions of belonging amongst the Kikuyu and Kalenjin communities. In addition, the country's institutional reforms were conducted in an environment of state capture by political elites, some of whom continued to hold powerful positions and preferred the status quo (Akech 2010, 8). For instance, Osse

(2014, 910) highlights how police reforms were “a slow process of “muddling through” and controlled by the executive.

Notwithstanding the complexities, Uganda’s and Kenya’s TJ trajectories unfolded, with the promises of a better future for the citizenry. The absence of reform initiatives would have probably worsened the conflict scenarios and contributed to new waves of political violence. Hence, the reforms were disincentives for political violence, as they opened up more space for public participation in governance, addressed regional inequalities, and articulated the protection of fundamental human rights.

### **2.3.1. Uganda’s progress from militarism**

Efforts to overcome Uganda’s militarism were envisaged in the NRM’s ‘Ten-Point’ programme, and the ‘Agreement on reconciliation and accountability between the GoU and the LRA’ (Republic of Uganda, 1986; 2007). Promulgated after the 1986 coup, the ‘Ten-Point’ programme called for “a political roadmap to inform the basis for a nationwide coalition of political and social forces to usher in a new and better future for the long-suffering people of Uganda” (Republic of Uganda 1986, 1). In the programme, the NRM outlined its vision for Uganda, including, inter alia: promoting democracy as a real emancipation of the people; consolidating national unity and eradicating sectarianism; eliminating corruption and abuse of power, and cooperating with other African states in defending democracy and human rights (ibid, 4-13).

As a first step of deepening democracy in Uganda, the NRM regime introduced decentralization as the country’s system of governance. The system was developed from earlier versions of Resistance Councils (RCs), which the NRM had developed in its areas of influence during war time (Mugabi, 2004). According to the NRM, the RC

was a radical democratic concept, given its participatory, popular and bottom-up approach, as opposed representative and elitist parliamentary system (Ddungu 1993, 366). Over time, the development of RCs in the country gradually transformed the highly centralized Uganda into a decentralized state, given power transfer from the centre to the peripheries (Mugabi 2004, 1).

Granted, the new system of governance bridged regional disparities that the independent 1962 constitution propounded by allotting some autonomy to southern regions and relegating the north to district statuses. Progressively, decentralization was promoted throughout Uganda and later on entrenched in the new constitution of 1995.

In the new constitution, Article 176 on ‘Local Government System’ provided for the establishment of districts as units of lower local governance and administrative functions. Article 176 also established the system of local government under democratically elected councils through universal adult suffrage. Thereafter, the Local Government Act of 1997 was enacted to consolidate the gains of decentralization. The Act was intended to align the local governments law with the constitution in order to operationalize decentralization of power and functions. The Act also sought to give effect to decentralization at all levels, in order to deepen democracy and promote financial and political establishment of local units.

Remarkably, the new constitution of 1995 was adopted and promulgated after national consultations and participatory processes. As Justice Ben Odoki, the chairman of the constitutional review commission documented, they embarked on countrywide civic education programmes to increase public awareness and debate about the process and the constitution itself (Odoki 2005, 47). In line with the NRM’s demands for people’s

participation, the commission conducted seminars in all the 800 sub-counties, and with special interest groups comprising women, youth, workers, security organs, civil servants and professional organizations (ibid, 48). The draft constitution was finally submitted to the Constituent Assembly (CA) for debate and adoption (ibid).

The new constitution committed Ugandans to democratic principles of freedom, equality and social justice, as well as peace, unity and progress.<sup>9</sup> It also set the country's political objectives on democratic pedestals, such as the empowerment and promotion of active citizen participation in their own governance, and citizen access to leadership at all levels. Besides, the constitution expanded Uganda's human rights regime in an expansive Bill of Rights.<sup>10</sup> For enforcement purposes, the constitution provided for the establishment of the Uganda Human Rights Commission (UHRC), that has since been active in championing the human rights agenda.

Further steps in the NRM's consolidation of peace was the promotion of an endogenous political philosophy – the broad base or movement political system. In this worldview, political pluralism was outlawed because it was believed to promote sectarian interests, which partly contributed to the country's instability (Museveni 1992, 1). According to one of the movement's supporters, the NRM represented “an enlightened leadership and army,” that contributed to Uganda's political stability (Bakunzi, 1992). In contrast,

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<sup>9</sup> Preamble of the Constitution.

<sup>10</sup> Chapter 4 of the Constitution.

political parties were believed to be ideologically deficient, thus their role in people's divisions (ibid).

For critics, the broad base was a clever manoeuvre to curtail political competition, or at best, an affront on democracy. Some of the movement's opponents described it as "a de facto one-party system, and a queer political organization which does not fit in the universally accepted democratic order" (Mucunguzi 2000, 1). To some, the system was a manifestation of the NRM's true intentions of "imprisonment in a monolith system" (Nabudere 2000, 1).

There were also suggestions that the broad base was a "clever illusion of one party system" (Interview, lecturer, Kampala, Uganda 29 January 2016). As such, the NRM's initial intentions of democratic governance were undermined by the trappings of power, which emboldened Museveni to stay put (ibid). Weighing in on the movement controversy, Mamdani (1991, 1) claimed that although the system was successful in establishing a credible government with a solid base, many problems emerged with efforts to consolidate it as a constitutional provision.

In order to settle the question of Uganda's preferred political system, a constitutional referendum was conducted in 2000. Consequently, the majority of the electorate rejected pluralism (African Elections Database, 2017). Yet still, the regime embarked on political reforms after the 2001 elections (Makara et.al, 2007), after which the 2005 referendum resulted in the majority's preference for pluralism (Africa Elections Database, 2017). As a result, old political parties (such as DP and UPC) were revived, while new ones, including the Forum for Democratic Change (FDC) and People's Democratic Party (PDP), emerged.

Since then, Uganda has conducted regular multiparty elections in 2006, 2011 and 2016. Nevertheless, there are regular accusations of uneven playing fields between the regime and the opposition, as well as reports of widespread electoral malpractices (Makara, 2010; Onyango, 2012; Lynch, 2016).

Despite Uganda's significant institutional reforms and democratization, the truth-telling processes was inadequately attended to. To a large extent, the Commission of Inquiry into Violations of Human Rights (CIVHR) that was formed in January 1986 to was undermined by lack of political will. Although the CIVHR conducted public hearings, with some broadcast on national television and radio stations, its findings were never publicized (US Institute of Peace, 2016).

Moreover, with regards to the northern conflict, the GoU has only accommodated TJ initiatives that respond to the LRA's alleged atrocities. This follows a systematic pattern of the regime's determination to depoliticize the northern conflict and consequently, deprive the LRA of any legitimate claims to insurgency. Thus, recent TJ mechanisms, such as traditional justice, reintegration and criminal accountability, are endorsed by the GoU in as much as they are responses to the LRA atrocities and their positionality as ends to war termination, rather than to atrocities also committed by the GoU.

However selective the mechanisms have been, they partly provided redress to some of the harm suffered by victims and contributed towards some form of truth-telling and healing. For example, amnesty and traditional justice were useful in persuading combatants to abandon rebellion and reintegrate into society. Furthermore, traditional



justice has provisions for truth-telling and paying some form of compensation to victim communities (Interview, Acholi elders, Gulu, Uganda, 21-30 March 2016).

Cognisant of selectivity in recent TJ mechanisms, Ugandan authorities have mulled with the idea of a comprehensive TJ policy. As a first step, the Justice, Law and Order Sector (JLOS) spearheaded a study in 2008, which sought to “collect baseline data on TJ and what it means for Uganda” (Republic of Uganda 2009, iv). As a result, several draft policies were developed, and a final document is pending cabinet approval (Interview, government official, Kampala, Uganda 4 February 2016). According to the drafters of the final TJ draft policy, it is “a first of its kind in Africa and the World at large ... and provides a holistic intervention to achieving lasting peace” (Republic of Uganda 2013b, 3).

The policy is derived from the Juba Peace process and is entrenched in one of the visions in Uganda’s National Development Plan – “a peaceful and stable Uganda” (ibid). The draft policy has great promise in contributing towards Uganda’s transformation because of its combination of various justice mechanisms and adoption of a victim centred approach. The question that remains is whether it will survive political storms and proceed to full implementation.

### **2.3.2. Kenya after 2007**

The cornerstone of Kenya’s transition from the 2007/2008 political crisis was the writing and promulgation of a new constitution in 2010. The constitution established frameworks for addressing the country’s conflict triggers of ethnic exclusion, regional inequality and institutional failures. Towards this end, the constitution provided for the creation of constitutional commissions on the national police, the judiciary, land,

revenue division and allocation, gender issues and elections management. Consequently, vetting processes ensued on the commissions' creation and the dismissal of some senior officials from public office (International Centre for Policy and Conflict, 2010; Osse, 2014). As already stated, the vetting processes failed in many instances due to resistance from proponents of status quo.

Moreover, through an Act of parliament, the National Cohesion and Integration Commission (NCIC) was created to consolidate Kenya's unity and provide checks on ethnic discrimination. (NCIC Act, 2008). However, at best, the NCIC is known to have failed in curbing hate speech and countering ethnic divisions (Makabila, 2014).

Significantly, the new constitution of 2010 introduced a two-tier system of governance; national and county governments, which formalized Kenyans' desire for devolution over the years. The first schedule of the constitution provided for 47 county governments with elected Governors and Members of County Assembly (MCA), and appointed County Executive Committees (Articles 176 – 179).

The new constitution also established a Senate with elected representatives from each of the 47 counties. As part of Kenya's bicameral parliament, the Senate has express provisions on advancing the interest of the counties and protecting devolution. In Article 96 of the constitution, the roles of the Senate are enlisted as: representing counties and promoting their interests, legislation on matters affecting counties, revenue allocation and division to counties, and exercising oversight over county government revenues.

Through devolution, Kenya sought to diffuse ethnic tensions that are associated with real and imagined perceptions of ethnic exclusions from the central government. In this

regard, Article 176 of the new constitution expounded the objects of devolution as: promoting national unity in diversity; protecting the interests of the minority groups and the marginalized regions; deepening democracy and accountability; fostering separation of powers; advancing equity in resource allocation; promoting self-governance and transfer of state organs and functions.

Owing to its transformational potential, the devolved system of governance was welcomed in many quarters. For example, the World Bank (2012, v) noted how devolution is a cornerstone of the new constitution and provides frameworks for addressing regional inequalities. Since its introduction, Kenya's devolution has eluded the tragedy of recentralization as occurred in other regional contexts, such as the DRC. This was due to the emergence of county governors who have showed their willingness and ability to protect their own positions as a result of political competitions and local-level pressures to defend devolved units (Cheeseman et.al 2016, 2). Despite the positive attributes of decentralization, the new constitution was unable to address Kenya's ethnic competition and impunity, which continue to prevail in everyday political processes.

The limitations of the 2010 constitution's transformational potential were exacerbated by the largely unsuccessful truth-telling process. Through an Act of parliament, the TJRC was formed in 2008 to investigate instances of human rights abuses that occurred from the post-independence era up to February 2008. In so doing, the commission was envisaged to promote Kenya's national healing and reconciliation (TJRC Act of 2008). Nonetheless, throughout its entire lifespan, the TJRC was embroiled in many challenges that ranged from: procedural, financial, legitimacy, operational and legacy

problems. Notably, the TJRC's credibility was dented by its chairman's (Bethwel Kiplagat) accusations of committing human rights violations during the Moi era (Kisiangani, 2013). In light of these challenges, the political class established a defective commission, which they hoped to eventually fail due to their disinterest in a successful truth-telling process (Lanegran 2015, 66).

More importantly, the TJRC's hearings were characterized by a disengaged public. In other words, the commission's hearings attracted limited media interest and public debate, as well as small audiences and insufficient awareness (Lynch 2014b, 181). As a result, the disengaged public undermined the prospects for a "transformative interaction between performers and an audience(s)," which could possibly create a sense of new beginning and result in catharsis, as the South African precedent envisioned (ibid, 181)

Despite its challenges, the TJRC finalized and submitted its report to President Kenyatta soon after his inauguration in 2013, with recommendations on: criminal prosecutions, public apologies, reparations and memorialization. To date, the President has only issued a blanket public apology in parliament and promised to establish a Kshs. 10 Billion reparations fund (Republic of Kenya, 2015).

The government's inaction on the TJRC report is attributed to a lack of political will to implement its recommendations. For instance, the Attorney General proposed amendments to the TJRC Act, which replaced the provision for an express implementation of the report with parliament's nod (TJRC (Amendment) Act 2013). Additionally, an MP exposed lack of political will in implementing the TJRC report by observing that "we do not know whether the report is telling the truth, or whether it is

driving justice or whether it is recommending reconciliation to this country” (cited in Shiundu 2013b, 1). Further, the MP suggested that the report ought to be amended for the country’s benefit (ibid, 1).

Turning to the plight of more visible victims of the 2007/2008 PEV, the government focused on resettlement programmes for the IDPs in the Rift Valley. The initiatives were however faulted for ignoring less visible victims, such as integrated IDPs, victims of police brutality and SGBV. The governments’ focus on a section of the IDPs reinforced stereotypes of ethnic favouritism and exclusion and widened divisions within the victim community (KPTJ 2013, 10). Occasionally, the excluded victim categories demonstrated against state neglect in resettlement programmes (Gitonga, 2017; Wanyama, 2017). Some of the victims petitioned national courts to compel the government to compensate them, and the cases are still ongoing (Interview, human rights activist, Nairobi, Kenya, 20 August 2015).

## **2.4. Conclusion**

Together with the ICC’s interventions, Uganda’s and Kenya’s reform initiatives significantly contributed towards their transformation from conflict to relatively peaceful scenarios. First, the ICC was instrumental in overcoming domestic conundrums in prosecuting alleged perpetrators of Uganda’s northern conflict and Kenya’s 2007/2008 PEV. Second, TJ mechanisms contributed towards the countries’ democratic consolidation and providing redress to some of the victims’ immediate needs.

Museveni described Uganda’s transition from militarism as ‘steady progress’ during the 2016 elections campaign. The slogan was informed by the country’s relative

political stability, economic growth and development of institutions as contrasted with yester years of political turbulence, economic decline and degradation of state institutions (NRM, 2016). Hence, for Museveni, the NRM's steps were remarkable, and were to be appreciated as the building blocks to Uganda's success (ibid, 6).

Notwithstanding the 'steady progress,' there are still many questions regarding the competitiveness of Uganda's politics, which expose the country to risks of a return to violence. Recent media reports on the opposition's suppression and elections malpractices are indications of a country that has a long way to go in terms of democratic consolidation. Museveni's longevity in power has created impressions of an incumbency that has no intentions of losing elections or power transfer (Lynch, 2016). In other words, Museveni and his NRM party manifest "permanent fixtures" in Uganda's political power, an idea that is commonly referred to as *pakalast* (Wilkins 2017, 621).

Also, as a Ugandan professor observed, Museveni is believed to have "never left the bush," as he uses threats of violence whenever the electioneering periods beckon (Interview, Kampala, Uganda, 29 January 2016). For instance, in the 2016 elections, the NRM warned of a possible military coup in the event the party lost the elections (Wafula, 2015). Given the tensions in Uganda's democratization, some wonder whether the country enjoys positive or negative peace (Odoi 2016, 1; Bwiire, 2017).

Similarly, 'Kenya after 2007' was remarkably different from the past where conflict mitigating factors such as the ICC, devolution and new institutions were non-existent. In this regard, and contrary to predictions of violence (Human Rights Watch 2013, 1), the 2013 elections were relatively peaceful, apart from a few pockets of protests and

violence in some opposition strongholds (Awuor, 2013; Momanyi, 2013). Whereas many would explain the relatively peaceful outcome of the elections on many Kenyans' desires to maintain peace (Long et.al 2013, 152), there was a substantial contribution of TJ discourses to this end. Indeed, and as Cheeseman et.al (2014, 4) argued, partial reforms legitimized the political system and electoral processes. Kenya's political problems still linger because of the inadequate implementation of some of the TJ mechanisms. This reality is exacerbated by the deep culture of impunity amongst the power elite and their determination to undermine democratic institutions.

Democratic deficits in both countries were aggravated by politicization of the ICC's interventions, which subsumed the Court's imports on consolidating peace. It is therefore imperative to ascertain the conditions under which the ICC's interventions in Uganda and Kenya were politicized, with detrimental effects on peace-building processes.

### Chapter 3

#### **Politicization of the International Criminal Court's interventions as exchanges about the moral universe**

Why and how is an ostensibly international legal response to heinous crimes susceptible to (mis)appropriation and subversion by domestic political elites? As a response to this critical question, this chapter analyzes actor and institutional exchanges about the moral universe, as well as the diffusion of the global norm of ICJ from international to local and regional spaces. Discerning the prominent role of domestic political elites in the uptake of ICJ, this chapter pays attention to how the GoU and Kenya's Jubilee Alliance translated the ICC's intervention in their respective realms. More specifically, this chapter discusses how the GoU and the Jubilee Alliance orchestrated transactional and adversarial exchanges on their ICC's interventions, which culminated in politicization.

By discussing politicization of the ICC's interventions in Uganda and Kenya as exchanges about the moral universe, this chapter illustrates how political elites' decisions on ICJ produce a complex web of relationships amongst diverse actors in spatial hierarchies. This culminates in the construction of glocal spaces – blends of local and global perspectives on ICJ.

Consequently, glocalization of ICJ produces exchanges amongst various actors and institutions about the moral universe that condition the uptake of the ICC's interventions in international, local and regional spaces. Further, the exchanges commit targeted constituencies to either cooperation or non-cooperation with the Court's



intervention, hence its susceptibility to (mis)appropriation or subversion by domestic political elites.

To illustrate, Uganda's transactional exchanges were anchored in the selective referral of the LRA to the ICC, and the GoU's reciprocal cooperation on the Court's selection bias and the insurgent's prosecution. More so, there were considerations for non-compliance on cooperation, in the event of the universality of justice or alternatives to the ICC in the LRA's annihilation. Notwithstanding their transactional intentions, the Ugandan authorities 'locked in' international cooperation in arresting and prosecuting the LRA. This was because of the cases' demonstration of the aspirations of the international community in constructing a moral universe whereby atrocities do not go unpunished.

For Kenya, the Jubilee Alliance's adversarial exchanges with the neo-colonial narrative articulated local autonomy from the international sphere, as well as regional solidarity and non-cooperation with the ICC. By turning to the local, the Alliance invented spaces under which they challenged the Court's normative imperatives and moral authority. On courting regional solidarity, the Jubilee Alliance spoke to claims of Africa's peripheral location in the global political economy. This gave new relevance to African protectionism, as exemplified in the AU's collective non-cooperation decisions on the Kenyan and Sudanese ICC cases.

Broadly speaking, the concept of glocalization of ICJ points to the quest for power, authority and legitimacy, in the politics of post conflict transition; within the local, and between the local and the international. The concept also leads to the development of a taxonomy of politicization of the ICC's interventions – transactional and adversarial

exchanges. Moreover, the notion of glocalization demonstrates the salience of the ICC's selectivity and neo-colonial narratives, and their emergence as critical challenges to the Court's normative imperatives. In sum, the Ugandan and Kenyan precedents allude to contextual normative adaptations, with overarching effects amongst diverse actor and institutional categories in the ICJ enterprise.

The chapter starts with discussions on domestic (political) translations of the ICC's interventions by political elites and their motivations in doing so. It highlights the GoU's intentions of using the ICC for domestic political struggles or the LRA's annihilation, and the Jubilee Alliance's aims in battling the Court's indictments. The chapter then turns to the idea of glocalization and discerns the concept's origins and applicability in ICJ. Afterwards, the chapter analyzes the GoU's transactional exchanges, their predilections with selection bias with state cooperation, as well as international cooperation in the LRA's arrest and prosecution. The chapter then moves on to the Jubilee Alliance's adversarial exchanges, their emphasis on local autonomy from the international sphere, and shifts towards regional solidarity and non-cooperation with the ICC. It then concludes with a brief summary of the aforementioned arguments, and acknowledgment of the reality of contested sovereignties that occasioned domestic normative contestations over ICJ. These concerns set out follow up arguments on the salience of the narratives in shaping the course of the ICC's reception in domestic spaces as discussed in chapter 4.

### **3.1. Domestic (political) translations of the International Criminal Court's interventions**

As players in domestic political processes which culminated in violence that the ICC sought to respond to, the GoU and the Jubilee Alliance took prominent roles in diffusing the Court's intervention in their respective situations. In turn, domestic political translations informed a great part of Uganda's and Kenya's uptake of ICJ.

Political elites' dominant roles in shaping the course of ICJ is aptly qualified in Subotic's (2009) theory of *Politics of hijacked justice*. Subotic posits that the diffusion of international norms in domestic spaces is inextricably linked to politics (ibid). As Subotic rightly argues, political elites strategically appropriate and use international norms, thus embedding them in everyday political struggles (ibid, 29). The ICC's diffusion in Uganda's and Kenya's political marketplaces also followed Zimmermann's (2015, 9) logic of consciously or unconsciously connecting international norms to various frames of interpretations and probable collective action.

Seemingly, the GoU's and the Jubilee Alliance's actions partly departed from the ICC's missions of justice in their realms. In contrast, they also predicated their translations of ICJ on assessments of a threat versus opportunity matrix, with a similar strand of claims to political legitimacy and authority.

For the GoU, the ICC's ability to galvanize international cooperation in arresting and prosecuting suspects was construed as an opportunity to confront the resilient LRA. As a human rights activist narrated, with the ICC, "people saw the emergence of a powerful Court, and that the international community would come and arrest the LRA" (Interview, Kampala, Uganda, 3 February 2016). Indeed, the timing of the ICC's

establishment in 2002 coincided with the regime's efforts to thrash the rebellion at a time the northern conflict was at its peak. Hence, the Ugandan authorities orchestrated transactional exchanges on ICJ as demonstrated in the 2004 selective referral of the LRA to the ICC, as opposed to an open referral.

Conversely, Kenyatta and Ruto opted for adversarial exchanges with the ICC because their indictments posed both existential threats and significant obstacles to their political ambitions. The possibilities of their convictions and languishing in jail, together with the shame of accusations for committing international crimes, were incentives for them to orchestrate various forms of adversarial exchanges. The climax of these exchanges was the neo-colonial narrative, and the Jubilee Alliance's successful election into power in the March 2013 elections.

As of the time of their ICC indictments, Kenyatta and Ruto harboured presidential ambitions in the forthcoming elections, which were buoyed by their respective political capital. The two were serving as senior government officials, in addition to their rich voting blocs of the Kikuyu and Kalenjin communities, that are the largest and third largest, respectively (Republic of Kenya, 2010).

Besides Kenyatta's vantage position as the son of Kenya's founding president, Jomo Kenyatta, a section of the Kikuyu political and business class had endorsed him to take over from Kibaki, who had exhausted his two-term constitutional limit (Gekara and Mathenge, 2010). For his part, Ruto's political fortunes obtained from the 2007 elections where he emerged as the most prominent Kalenjin politician, in addition to his mobilization of considerable votes against the 2010 constitution (Lynch 2014a, 96).

Ruto was also endorsed by the Kalenjin community as their preferred presidential candidate in the upcoming elections (Komen and Koech, 2012).

Therefore, for Uhuruto (as they became popularly known), the ICC's indictments presented a symmetry: political baggage and capital in equal proportions. With regards to the former, accusations for committing international crimes and killing each other's supporters undermined their credibility for leadership. Whereas Ruto was associated with targeted attacks against the Kikuyu in the Rift Valley, Kenyatta was accused of organizing and financing revenge attacks in Nakuru and Naivasha in central Rift Valley.

On the flipside, Kenyatta and Ruto's indictments presented viable opportunities for their collaboration in fighting common enemies – the ICC and its domestic proponents. Commenting on the binary position Uhuruto faced, Wolfe (2015, 163) opines that despite their initial considerations of the ICC as a fatal liability, it portended as a crucial asset. According to Wolfe, the ICC's positionality as a “sword of Damocles” ironically emerged as a critical ingredient for electoral victory (ibid, 165).

Accordingly, for Uhuruto, an electoral success in 2013 was a strategy in battling the ICC by using state authority to undermine the cases or opening the opportunities for not attending Court proceedings if the former scenario failed (Mueller 2014, 26). In their calculus against the ICC were a combination of efforts, namely: case termination or deferral, the OTP's accusations of witness intimidation and interference, fighting human rights activists who actively supported the Court, and public vituperation of the ICC as a performance of injustice, a kangaroo Court, and a neo-colonial institution.

The GoU's and the Jubilee Alliance's political translations of the ICC's interventions extended beyond individual convictions, and subsequently helped influence collective perceptions on the cases in the spatial hierarchies. In other words, the political elites' decisions on the ICC incrementally gained traction amongst targeted constituencies in local, regional and international spaces.

First, the GoU's selective referral significantly shaped the course of the Court's investigative steps, and the international communities' successive involvement with actors to the northern conflict (Nouwen and Werner, 2010). Whereas the ICC's path in Uganda could be attributed to the insurgent's relative disengagement from its processes and the government's positionality as legitimate state authority, the selective referral was salient in shaping the Court's investigative and prosecutorial ventures.

Second, the Jubilee Alliance's neo-colonial narrative, together with other factors, shaped the decisions of voters in 'electing the alliance of the accused.' The narrative was continuously articulated during the course of the 'Ocampo Six' trials and effectively utilized by the Jubilee Alliance during the 2013 elections campaigns. Accordingly, Lynch (2014a) rightly attributes the Jubilee Alliance's electoral success to their peace messaging, elite level bargains, reframing the ICC story as a performance of injustice and neo-colonialism, and casting their opponents as agents of continuity. As Lynch concludes, the Jubilee Alliance used an array of analytical and performative strategies under which they reframed predominant narratives that built on, and helped shape, domestic understandings of justice, injustice, threats and opportunities (ibid).

Taken together, narrations of the ICC's selectivity and neo-colonialism negated the notion of international cooperation in combating impunity for international crimes.

Conversely, the narratives produced glocal spaces under which state actors reconfigured cooperation with the ICC, given their relative power positions vis.à-vis the global institution. Thus, glocalization opened up the ICC's interventions to either (mis)appropriation or subversion in domestic spheres.

### **3.2. Exchanges and glocalization of international criminal justice**

The discussions of adversarial and transactional exchanges on the ICC's interventions in Uganda and Kenya build on sociological theory of glocalization as 'the new norm.' For example, Ritzer (2003, 193) posits that glocalization, and comparable concepts such as hybridity, is central to how contemporary globalization scholars reflect on transnational processes.

As a starting point, the word *glocal* is coined by combining global and local (Roudemtof 2016a, 1). Thus, the concept of glocalization has emerged as analytically autonomous from globalization, and it should not to be interpreted as *glocalism* (ibid, 1). Whereas globalization infers increased interactions across the world (Robertson 1992, 6), *glocalism* denotes championing the glocal's advantaged position over other concepts (Roudemtof 2016a, 1). On the contrary, glocalization allows for a "foundation to designate a process possessing analytical autonomy vis-à-vis other related concepts" (Roudemtof 2016b, 397).

For a working definition, Ritzer denotes glocalization as "the interpenetration of the global and the local, resulting in unique outcomes in different geographic areas" (2003, 193). For Roudemtof (2016b, 403), glocalization is "the refraction of globalization through the local; resulting in glocality – a blend of the local and the global." In other

words, glocalization systematically produces variations which are constitutive of the glocal (ibid, 399).

Amongst the advantages of glocalization are its emphasis on heterogeneity, which considers the power of all global forces in cultural, institutional and economic spheres (Ritzer, 2003). In addition, glocalization permits reflections on change across spatial spaces without the outcome of total integration (Roudemtof (2016b,401). In this regard, the concept of glocalization is useful in the analysis of local-global relationships, as it vests power amongst all actors and institutions, as opposed to one-sided relations (ibid, 401). In short, under glocalization, power relations entail the possibilities of resisting globalization (ibid, 401).

Therefore, the concept of glocalization is definitive of the ICJ movement that involves diverse actors and institutions in the moral universe, albeit with diverse power positions and convictions. Glocalization thus enables an analysis of power relations in the diffusion of ICJ across temporal and spatial terms. Perhaps, in the global norm of ICJ, the concept of ‘trials of cooperation’ or ‘virtual trials’ provides the best reference to power relations amongst diverse actors and institutions. As Peskin (2009, 660) persuasively posited, the idea of ‘trials of cooperation’ can elucidate the nature of power struggles outside the courtroom between tribunals and state authorities or actors.

As other international criminal tribunals, the ICC lacks executive power and a police force of its own, which relegates its powers to relying on shaming and soft power to persuade state cooperation. For example, during his address to the UN General Assembly (UNGA) in 2014, former ICC president, Judge Song (2014, 6), stressed the Court’s dependence on cooperation, stating that “the Rome Statute is only as strong as



states make it.” Similarly, in her address to the UNGA in October 2017, Song’s successor, Judge Silvia Fernández de Gurmendi, noted that none of the Court’s activities are possible without the cooperation of states (Gurmendi 2017, 4).

In contrast to the ICC’s persuasions on cooperation, state actors act on a balance of their commitment risks and noncompliance risks: apprehensions around the reach of ICJ, and appreciation of international norms. Potentially, these delicate scenarios lead to trials of cooperation or virtual trials. An ICC official revealed this dilemma by expounding how, given the ICC’s dependence on mature state responsibility, it is constrained if political elites orchestrate non-cooperation and there is an absence of UN pressure (Interview, The Hague, Netherlands, 22 July 2015). As the official further concluded, the “ICC depends on states living to their international responsibilities, an equivalence of expecting politicians to prioritize the rule of law as opposed to their interests” (ibid).

Even so, the ICC’s moral standing and shame afflicted on individuals upon indictments or non-compliance compels state actors to attempt cooperation. This perhaps explains the GoU’s cooperation with the ICC on the LRA trials; long after the country’s leadership embarked on public vituperation of the Court to wade off the possibilities of the universality of justice.

Equally, Kenyatta and Ruto complied with Court summonses and attended pre-trials and trial briefings at The Hague; despite their orchestration of adversarial exchanges. They only skipped the Court’s sessions after seeking approvals and the 2013 amendments to the rules of evidence and procedure (ICC, 2013). Furthermore, Kenyatta premised his compliance with the Court summonses as an avenue for

absolving himself from blame and defending Kenya from pre-judgements (PSCU 2013, 1). Kenyatta also argued that his and Ruto's voluntary appearance for trials when summoned obtained from their belief in the rule of law and international justice (Daily Nation, 2015).

According to a former senior government adviser, Kenyatta pursued the compliance strategy even after his election, despite the options of al-Bashir's open defiance strategy (Kagwanja, 2014). According to the former government adviser, a defiance option would potentially expose Kenyatta to an arrest warrant and subsequent condemnation as a fugitive President, and Kenya's international isolation as well as economic sanctions (ibid,1).

Notwithstanding their efforts at compliance, the GoU's and the Jubilee Alliance's translations of the ICC's interventions were compounded by many other non-compliance strategies. These comprised Museveni's decisions to join Africa's calls for withdrawal from the ICC (Makana, 2014), invitation of Sudan's Bashir to Uganda for his 2016 inauguration, failing to arrest him, and lashing at the Court as a "bunch of useless people" (see for example Mukiibi et.al., 2016).

Consequently, the OTP condemned Uganda for non-compliance, and referred the matter to ICC's Pre- Trial Chamber II. In a July 2016 ruling, the Court found that "pursuant to article 87(7) of the Statute, Uganda had failed to comply with the request for arrest and surrender of al-Bashir and decided that non-compliance be referred to the ASP and the UNSC" (ICC 2016, 9).

Likewise, Uhuruto engaged in many affronts on the ICC despite pledging compliance. At the local level, their allies in the National Assembly passed three motions to repeal

the International Crimes Act and withdraw Kenya from the ICC (Rugene, 2010; Smith, 2013; Mathenge, 2016). Their PNU allies in the coalition government also embarked on shuttle diplomacy to African states, the UNSC, and Western countries to push for deferral of the Kenyan ICC cases, and alternative domestic trials (Standard, 2013).

Having found no evidence that the Kenyan cases threatened international peace and security, the UNSC suggested the country's options of challenging case admissibility under Article 19 of the Rome Statute (UNSC, 2011). Accordingly, the Kenyan government challenged admissibility, based on judicial and constitutional reforms, and anticipated prosecution of some of the alleged perpetrators of the 2007/2008 PEV (ICC, 2011). Nonetheless, Pre-trial Chamber II dismissed the admissibility case, as well as an appeal in June 2011 (ICC, 2011).

Some of Uhuruto's allies claimed that the ICC charges were fixed and based on a witch hunt and on compromised witnesses (Citizen TV, 2015). Kenyatta and Ruto also fought prominent human rights activists who supported the Court's processes. Notably was the idea of an 'evil' civil society in the run-up to the 2013 election,<sup>11</sup> and threats to change laws regulating the funding of CSOs after the election (FIDH/KHRC, 2016).

In the Kenyatta and Ruto cases, the OTP often complained about witness intimidation and interference, as well as non-cooperation in turning over crucial evidence. In one of her statements on the Kenyan cases, Fatou Bensouda decried the state's failure to cooperate with the Court in order to execute her mandate (ICC, 2014b1). Further,

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<sup>11</sup> Many governance and human rights activist interviewed expressed these sentiments.

Bensouda identified some of the challenges her office faced as: systematic misleading media reports about the Kenya cases; concerted efforts to intimidate and harass witnesses, and many instances of exposing some witnesses (ICC 2014b, 1).

Additionally, Kenya's defiance continued after the country's referral to the ASP for non-cooperation in September 2016 (ICC, 2016). For example, the then Foreign Affairs Minister, Amina Mohammed, declared that Kenya would not accept to be dictated on by the ICC that it helped establish (Namunane, 2016). Mohammed went further to state that the Court should listen to Kenya in order to enhance its credibility, besides pledging to use the ASP to pursue the country's case (ibid).

Apart from Uganda's selectivity and Kenya's neo-colonial narratives, other deflections on the ICC's interventions in the two countries were more localized and engaged less with the Court's normative imperatives. In turn, the narratives directly confronted the ICC's power position, in addition to reaching a wider audience across the spatial hierarchies. So, the narratives accounted for global-local exchanges on the ICC's interventions in Uganda and Kenya, as well as subsequent glocalization of ICJ.

Hence, the concept of glocalization is adaptable to the GoU's selectivity and the Jubilee Alliance's neo-colonial narratives, as demonstrations of actor and institutional interactions and construction of a complex web of relationships, which result in glocality. Therefore, due to glocalization, the exchanges about the moral universe committed intended actors to either cooperation or non-cooperation with the ICC, which exposed it to the risks of politicization in local spaces.

### **3.3. Transactional exchanges in the Ugandan situation**

Contrary to the concerns of the Rome Statute's drafters on sovereignty dilemmas, Uganda gifted the ICC with its first situation, after triggering Article 14 on the "referral by a state party." As the Court's first referral by a state party, the country's decision was hailed by an ICC official as "evidence of its faith in the institution" (Gyezaho 2013, 1). In some quarters, the referral was received as a step in the right direction in the global war on impunity for mass atrocities (see for example, Human Rights Watch, 2004).

However, many observers argued that by accepting the referral, the ICC was used by the GoU to settle domestic political scores (Branch 2007; Peskin, 2009). Moreover, the referral attracted sentiments of "a classic free-rider problem or moral hazard," and the ICC's facilitation of states to abandon their legal responsibilities (Burke-White 2008, 62). Even so, the GoU's actions were intentional and targeted at achieving specific outcomes. The referral produced a classical example of political translations of international norms and their instrumental use in domestic elite level political settlements.

By strategically referring their military/political opponents to the ICC, the GoU achieved two critical outcomes: (1) depoliticizing the LRA's insurgency through formalizing the group's identities as war criminals, and (2) gaining international legitimacy as supporters of ICJ. Nevertheless, the two simultaneous results came at a cost of selection bias in cooperation. More worryingly, the latter was subject to withdrawal in case of the universality of justice or alternatives to the ICC in

annihilating the LRA. Yet still, the GoU's transactional intentions galvanized international cooperation in arresting and prosecuting the LRA.

### **3.3.1. Options for selection bias and reciprocal cooperation**

Despite the Rome Statute's conferment of universality of jurisdiction to the ICC, it delegates relative power to state authorities, particularly in the self-referral regime. As such, the referral provision empowers domestic authorities to shape the contours of ICJ. Specifically, Article 14 on "referral of a situation by a state party" calls upon states to "specify the relevant circumstances and be accompanied by such supporting documentation as is available to the state referring the situation." However, the empowered domestic actors might not necessarily share good faith intentions as the ICC's within their realms.

Taking notice of their relative power in the Rome Statute, Ugandan authorities opted for a selective referral, and not an open one. This signalled their transactional intentions with the ICC's intervention. The most overt demonstration of such motives was the joint announcement of the referral at a London press conference by the then ICC Prosecutor, Ocampo, and Uganda's President – Museveni (ICC, 2004b). According to a Ugandan human rights activist, the nature of the referral spoke to "politics of the ICC, ingenuine quest for justice and the Court's acceptance of compromise on its part" (Interview, Gulu, Uganda, 30 March 2016). More succinctly, Uganda's former Prime Minister, Apolo Nsibambi, articulated the GoU's transactional intentions by conflating the ICC's trials with military offensives in their collective strategies in defeating the LRA (Musoke, 2006).

Following the GoU's script, the ICC's subsequent investigative steps focused on the LRA, despite calls for the universality of justice. Initially, the referral was designated as "Situation concerning the LRA," which negated Ocampo's assertions of interpreting the scope of the referral consistently with the principles of the Rome Statute, and analyzing the crimes by whomever committed them (ICC 2004c, 4).

As further evidence of their transactional intentions, the Ugandan authorities partly ceded their primary responsibility in the Statute to the ICC. For example, in the referral note, Uganda's Solicitor General (SG) argued that "they had not conducted and did not intend to conduct national proceedings ... so that the cases may be dealt with by the ICC instead" (ICC 2009, 20). The SG further suggested that despite the wide recognition of Uganda's judiciary for its impartiality and effectiveness, they construed the ICC as the most suitable platform for investigating and prosecuting the most responsible perpetrators of international crimes committed in the country (ibid, 20).

Notwithstanding these apparent transactional objectives, the selective referral was persuasive, including to the ICC's judges. The referral pointed to Uganda's admission of inability/unwillingness to prosecute international crimes that were committed within its borders. Thus, in the Court's "Decision on case admissibility," Pre-Trial chamber II cited the Solicitor General's declarations, observing how, "in the view of Uganda, these conditions entailed that none of the conditions of Article 17(1) of the Rome Statute applied, and consequently, that such cases were admissible before the ICC" (ICC 2009, 20).

In addition, Museveni declared the GoU's cooperation with the ICC to visiting German President, Horst Kohler, in 2008. While assuring Kohler of Uganda's cooperation,

Museveni refuted claims that the LRA cases were obstacles to peace in northern Uganda (Wasike 2008, 1). This was against the backdrop of complaints in the north that the ICC's pursuit of the LRA was counterproductive for peace efforts. As Museveni retorted, the demurs on the ICC's interventions were promoted by the LRA sympathizers, and that the ICC is a complementary judicial system (ibid). Turning to Kohler, Museveni noted that "the ICC is against impunity so am I and I hope so are you" (ibid).

More concretely, after Dominic Ong'wen's surrender in CAR in 2015, the GoU promised full cooperation with the ICC, and asserted their intentions not to save the suspect from his predicaments. In this vein, the Attorney General (AG) denied reports of the government's plans to appoint Ong'wen's defence team and refuted any chances of granting him amnesty (Republic of Uganda, 2015a). Further, the AG stated that the decision to try Ong'wen at the ICC was convenient and a consensus by all states in which Ong'wen allegedly committed atrocities (ibid, 1).

Moreover, the AG ruled out any chances of amnesty and Acholi traditional justice for Ong'wen, on the premise that only non-ICC indictees can be pardoned (ibid). According to the AG, amnesty's constitutionality was still under review in the Supreme Court, and it could not stop Ong'wen's ICC trial (ibid). In addition, the AG observed that amnesty could only be invoked after "after Ong'wen's prosecution in a court of law (ibid, 1).

Conversely, the AG hinted at the government's intentions to fully cooperate with the ICC in Ong'wen's investigation and prosecution (ibid, 1). According to the AG, the prosecution of the LRA's atrocities was important for Uganda's progress and



subjugation of international crimes (ibid, 1). For his part, Museveni assured Bensouda that despite their differences, “they were on the same side” (Republic of Uganda, 2015b). Additionally, he instructed the AG, SG and the DPP to avail the ICC all evidence and pursue cooperation (ibid). In turn, Bensouda welcomed the GoU’s cooperation, and appreciated access to senior government officials, including: the DPP, SG, ministers, and the parliamentary caucus for northern Uganda and Soroti, as well as scenes of LRA atrocities (ibid).

It could as well be argued that the OTP’s steps in commencing investigations on the LRA side was pragmatic, and an efficient strategy in case progression. In view of this strategy, the OTP’s initial focus on the LRA would possibly be followed up by closing in on the GoU’s side much later on. As a Deputy ICC Prosecutor observed at a CICC event, the OTP’s actions could be likened to choosing between “action and paralysis” or “pragmatism and ideals,” and that pragmatism ought not to be disparaged (cited in Kersten 2013, 1).

Granted, the OTP’s pragmatic intentions had to carefully navigate the GoU’s strategic interests in the referral, which were not necessarily justice concerns. According to a former senior NRM official, the state-referral provided latitudes for the authorities to be listened to, and their strategic interest was that “Kony was the bad boy, and the state are good guys” (Interview, Kampala, Uganda, 16 December 2016). The official further revealed that “the government actors could be easily implicated, and hence could not accuse themselves by referring an open situation” (ibid). Moreover, the former NRM official revealed that the ICC’s precedents could also close on Museveni because of his longevity in power, and the possibilities of making mistakes during this time (ibid).

This prompted the logic of stopping the ICC ‘monster’ which can encroach on anybody (ibid).

In diminishing the possibilities of the ICC’s universality of justice, Museveni embarked on public attacks on the Court from 2013, which he conveniently conflated with Pan Africanism. On this note, a Ugandan professor claimed that the ICC is Museveni’s friend when it confronts his enemies, but he quickly remembers his African roots when it comes to the possibilities of his investigations (Interview, Kampala, Uganda, 13 January 2016). Towards this end, he suggested, Museveni’s actions befit “an inconsistent opportunistic approach to the ICC” (ibid).

Museveni’s affronts on the ICC also included contemplations on withdrawing the GoU’s cooperation altogether, when the LRA’s indictments posed as obstacles to the conclusion of the Juba peace talks between 2006 and 2008. A human rights activist who participated in the Juba mediation recalled how “Museveni announced publicly that he would give Kony amnesty to return and reintegrate” (Interview, Kampala, Uganda, 03 February 2016.). Amnesty was to be extended to other senior LRA commanders as an incentive for their positive responses during the peace talks. (New Vision, 2006).

Furthermore, Museveni revealed that once amnesty was granted, Uganda would not succumb to the international community’s pressure and reverse its decision (ibid). If challenged, he claimed, Uganda would make their case at the AU Peace and Security Council (ibid). Museveni premised the amnesty alternative on the fact that it was the GoU that had requested the ICC’s intervention in the first place (McGreal 2008, 1). This argument was reinforced by his assertions that Ugandans had agreed to traditional

justice for the LRA, “which is more compensatory than a retributive system” (ibid, 1). Consequently, the Ugandan president considered challenging the cases’ admissibility by instituting domestic alternatives to the ICC or writing to the UNSC for case deferral (Wierda and Otim, 2011).

Conversely, some international observers contested Museveni’s intentions of challenging case admissibility. For instance, Meron (2011, 160) argued that there are no provisions for withdrawing a referral in the Rome Statute, and that Museveni’s actions could undermine the ICC’s legitimacy and effectiveness as a court of law. Meron suggested that the ICC should subject Uganda to an admissibility challenge to the highest possible scrutiny (ibid, 161). In so doing, the Court would prevent the risks of using the complementarity regime to shield suspected war criminals from real accountability. The ICC would also gain its respect as a court of law and evade the risks of perceptions of manipulations by Ugandan authorities (ibid, 163). Moreover, Meron emphasized that the “interest of justice” standard should be depoliticized, and the OTP and judges must adhere to the rule of law and the intentions of the Rome Statute in their judgements at all times (ibid, 166).

### **3.3.2. ‘Locking in’ international cooperation**

Besides the options for selection bias with state cooperation and vice versa, Ugandan authorities also envisaged to galvanize international assistance in apprehending the LRA with the referral. On the referral note, the GoU argued that their action was motivated by domestic inability to arrest the LRA due to the rebels’ operations from South Sudan, which was beyond their judicial reach (ICC 2009, 19). In this regard, Nouwen and Werner (2010, 949) rightly posited that the referral was intended to “rally

international assistance for the arrest of their military opponents.” This would make the ICC succeed “where the GoU had failed.”

Further evidence that the referral appealed to international assistance in arresting the LRA was its conception as a military strategy. It was conceived by the Ministry of Defence, with later incorporation of the Ministry of Justice as the lead agency in subsequent communications with the ICC (Nouwen, 2013; Nouwen and Werner, 2010). Additionally, the then Defence Minister, Amama Mbabazi, was at the forefront of addressing the National Assembly with regards to the referral (ibid). In one of his addresses to parliament, Mbabazi alluded to Uganda’s appeal for international assistance, thus:

How does ICC operate? ... They have the office of the prosecutor; they carry out investigations and actually the international community supports them. So, should Kony be indicted, and should he be indicted before we capture him, who will look for him in order to compel him to appear before this committee? It is not Uganda; if they ask us we shall lend a hand, but actually it will be international forces (Mbabazi, 2009, cited in Nouwen and Werner 2010, 949).

Despite its transactional nature, the GoU’s selective referral ‘locked in’ the international community in a cooperation regime for effective prosecution of the LRA. Although selective, the trials were indicative of the ICC’s expressivist function and testimony to the aspirations of the international community in constructing a moral universe. In this regard, Akhavan (2001, 8) posits that instances of accountability, even

if limited and selective, significantly alter the culture of impunity that includes political acceptance of rights abuses.

After the GoU's referral, the OTP called for international cooperation with Ugandan authorities in the pursuit and arrest of the LRA. Ocampo asserted that "a key issue will be locating and arresting the LRA leadership, which need the active cooperation of states and international institutions in complementing Uganda's efforts" (ICC 2004b, 1).

Subsequently, the EU, as staunch supporters of the ICC, supported the arrest warrants and renewed their calls for the prosecution of genocide, crimes against humanity and war crimes (EU 2008, 24). The EU also linked the arrest of the LRA leadership to the Court's credibility and replaced criticisms of the GoU's abuses and failure to address the northern humanitarian situation with renewed support (Nouwen and Werner 2010, 950).

Also, the calls for international cooperation motivated the motion of other agencies, as revealed in the UK House of Lords' debate on 26th March 2012 (House of Lords, 2012). When responding to concrete steps the UK was taking on the LRA, the Lord Howell of Guildford, and Minister of State, Foreign and Commonwealth Office, revealed that the UK, "continued to work with international partners to bring the LRA to justice and led on the LRA at the UNSC" (ibid, 1). Besides, the UK "secured the council's presidential statement of November 2011, which tasked the UN to deliver a coherent, co-ordinated and results-focused regional strategy to combat the LRA" (ibid, 1). The Lord Howell of Guildford also acknowledged "that the UK was working alongside the UN, AU, EU and the ICC to bring Kony to justice" (ibid).

A clear indication of international cooperation was the coordinated efforts by several states in Dominic Ong'wen's transfer to the ICC in 2015. The GoU shows how "Ong'wen's surrender to the Seleka rebels in CAR and subsequent transfer to The Hague involved various actors namely: CAR, the USA military, the AU regional taskforce and the UPDF" (Republic of Uganda 2015a, 1). According to the Ugandan authorities, "the multi-faceted effort to appropriately handle the surrender of Ong'wen conferred to it international clout, that requires that the perpetrator be tried by the ICC, in which all the actors would have confidence" (ibid, 1). Interestingly, even non-ICC members states – the USA and Sudan – cooperated with the GoU and the ICC with regard to the LRA. Whereas the USA cooperated in Ong'wen's transfer to The Hague, Sudan signed an agreement on cooperation with the ICC regarding the LRA case (Nouwen, 2013).

Following Ong'wen's transfer to The Hague, the ICC's prosecutor appreciated international cooperation that the (selective) referral had attracted, and renewed calls for more cooperation in arresting other fugitives of justice. Moreover, Bensouda posited that Ong'wen's transfer to the Court's custody, "sends a firm and unequivocal message that no matter how long it will take, the OTP will not stop until the perpetrators of the most serious crimes ... are prosecuted and face justice for their heinous crimes" (ICC 2015b, 1). The OTP "was grateful for the persistent efforts of the GoU, CAR, the UPDF, the AU Regional Task Force, and generally, all who had helped realize this significant development" (ibid, 1). In addition, Bensouda called on the renewal of international efforts in arresting Joseph Kony in order to secure justice for many

victims of his alleged atrocities that largely remained unpunished for several years (ibid, 1).

Evidently, the GoU's intentions with the ICC's intervention were transactional. This was demonstrated in the nature of the referral, reciprocal cooperation with selection bias, and options to withdraw cooperation in the event of the universality of justice or alternatives to the ICC in ending the northern conflict. Nevertheless, the transactional intentions invited international cooperation in the LRA's arrests and prosecution.

Unlike their Ugandan counterparts, Kenyatta and Ruto were directly affected by the ICC's intervention in Kenya's 2007/2008 PEV. Thus, Uhuruto's circumstances motivated their adversarial exchanges with the neo-colonial narrative, which gained traction in national and regional spaces, and international recognition.

### **3.4. Adversarial exchanges in the Kenyan situation**

The Jubilee Alliance's adversarial exchanges on the ICC's intervention in Kenya was a culmination of Kenyatta and Ruto's endeavours to evade criminal accountability for the 2007/2008 PEV. Under these intentions, the two political elites were determined to reverse the country to the status quo, where Kenyans 'forgot' and 'moved on,' as was publicly the case with the election-related violence in 1991, 1992, 1997, 2002 and 2005.

Nevertheless, Kenyatta and Ruto had to contend with the relative force of the ICC, whose entry into the country altered local power dynamics and the nature of the country's post-conflict transition. Consequently, the contrasting paradigms – of

Uhuruto's determination at self-preservation, and the ICC's confrontations with impunity for international crimes – set the two parties on a collision path.

With the neo-colonial narrative, however, Kenyatta, Ruto and their allies in the Jubilee Alliance posed significant challenge to the ICC's moral authority and placement of international law at the centre of conflict resolution. Using the narrative, the political elites set the ICC against collective communal, national and regional interests, which asserted their relative power vis. a. vis the Court's. As a result, the narrative pronounced local autonomy from the international realm; besides courting regional solidarity and non-cooperation with the ICC. On regional solidarity, the narrative spoke to claims of Africa's peripheral location in the global political economy, which called for African protectionism and non-cooperation on Kenyatta and Ruto's cases.

#### **3.4.1. Departing from the international to the local**

By translating the ICC's intervention as neo-colonial, Kenyatta and Ruto departed from internationalism, and instead shifted to local agency in addressing the 2007/2008 violations. The reinterpretation of the ICC as 'foreign' or 'Western,' as opposed to an ICJ mechanism that was agreed on by several states, found resonance with a significant majority of Uhuruto's core support base. In turn, the neo-colonial translations negated Kenya's ownership of the Court despite the country's critical role in its formation.

Admittedly, Kenya played an active role in the formulation of the Rome Statute at the UN's Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC in 1998. As already revealed in Chapter 1, Kenya was among the states which assumed the vice-presidency position at the Rome Conference that was attended by many government officials and diplomats (Shiundu, 2013a). Besides, the Kenyan delegation



registered their willingness to agree with the majority decisions, regardless of their reservations on the proposed OTP's prosecutorial discretions (ibid, 1). Kenya's fears were informed by envisaged pressures that might be exerted on the OTP to act or not to act, to the detriment of requirements for the office's independence (ibid).

Setting aside Kenya's ownership of the ICC, Kenyatta and Ruto regularly conflated the Court's intervention with neo-colonial intentions. In this vein, they invented spaces under which they challenged the Court's normative imperatives and moral authority. Emphasizing local agency in providing redress to the 2007/2008 PEV for which they were accused, they articulated the everyday political economy of the Kikuyu and Kalenjin communities, which they juxtaposed with propositions for inter-communal dialogues and overcoming collective community threats, notably the ICC and its domestic supporters.

Conversely, the ICC was at a disadvantaged power position in responding to elastic local dynamics. This obtained from the Court's: (1) adherence to legality as stipulated in the Statute, (2) relative distance from sub-national and national spaces, (3) and the incapacity of the outreach office to respond to adept political actors. In the end, the Jubilee Alliance's departure from internationalism to the local provided avenues for maximizing their power (*vis-à-vis* the ICC's) where it resided – in national and sub-national spaces.

Indeed, and as it has already been argued, the local focus naturally contrasts internationalism, given its promotion of the distinction between the 'inside' and the 'outside' in competition for political authority and legitimacy (Stahn 2015, 246). Turning to the local also comes with the benefits of appropriating domestic

experiences, narratives, empathy and perspectives of international action, and utilizing them to assess institutional legitimacy (ibid, 48). In this vein, the ICC is susceptible to some of the predicaments that other liberal and emancipatory projects encounter in their activities in local realms (ibid, 50).

Discernibly, the Jubilee Alliance's vantage power position against the ICC obtained from a clash of paradigms: delocalization versus localization. Whereas the ICC delocalized the 2007/2008 PEV as serious atrocities that were to be prosecuted under international law, the Jubilee Alliance localized the events as socio-political issues that were best addressed by the directly affected parties. In other words, the ICC's labels of crimes against humanity that Kenyatta and Ruto were accused of contradicted local explanations of the PEV under the lenses of everyday societal tensions afflicting the concerned parties.

Within the localization lens, the Jubilee Alliance challenged the ICC's individualization of guilt by apportioning blame to Kenyatta and Ruto. The Alliance wondered why the Court did not indict Kibaki and Odinga – the frontrunners of the 2007 presidential race and protagonists of the violence. As Lynch (2014, 105) revealed, there were questions on the ICC's focus on Kenyatta and Ruto as the most responsible perpetrators, given that they did not contest for the presidency in 2007. In turn, the Jubilee Alliance argued that by not targeting leaders from other communities (Luo and Luhya), the ICC was against collective Kikuyu and Kalenjin interests, and conflated the omissions with plots to undermine Odinga's political opponents.

Turning to the utility of their alliance, Kenyatta and Ruto positioned themselves as uniquely placed to bridge the social tensions amongst antagonistic Kikuyu and Kalenjin

communities, which culminated in the 2007/2008 PEV. Significantly, their suggestions found resonance to a significant number of their co-ethnics. Thus, they sold a compelling story of how their unity presented an opportunity for peace and reconciliation (Waweru 2012, 1). The Jubilee Alliance's peace message was expressed across several platforms, namely: political/prayer rallies, TV talk shows, vernacular radio stations, and informal networks across many sub-national spaces.

For instance, during an April 2011 prayer rally ahead of Kenyatta's and Ruto's visits to The Hague, they said that they promised to consolidate their unity in advocating for peace in the in the Rift Valley (Ngirachu and Musembi 2011, 1). Speaking at the rally, Kenyatta declared his belief in the unfolding unity that would be instrumental in reaching out to others and develop the country (ibid, 1). For his part, Ruto acknowledged that Kenya has several challenges which needed to be addressed in order to deter fighting in the future (ibid). Another speaker at the rally regretted that peace would be elusive in the country in case Kenyatta and Ruto would be shipped to a foreign land (ibid, 1).

Joining Kenyatta and Ruto's peace caravan were prominent politicians and some religious leaders from their respective communities. For instance, a Kalenjin MP praised the Jubilee Alliance for contributing toward peace, while his Kikuyu counterpart argued that the masses would welcome their leaders' unity pact (Sigei 2011, 1). Likewise, an influential Catholic Bishop noted that "the politicians would speed up the cohesion they had been building" (ibid, 1). Although the Bishop acknowledged the fluidity of peace in the Rift Valley, he was confident in non-repetition of the violence with Kenyatta's and Ruto's decision to work together (ibid,

1). A Kikuyu clergy also noted how, “there was a very good chance for peace ... the alliance was going a long way to cement good neighbourliness among the villagers from the two communities” (ibid, 1).

Closely linked to the religious leaders’ association with the Jubilee Alliance’s peace messages was a neo-Pentecostal discourse, which the former reinforced, and the latter tapped into. A Rift Valley based peace activist who doubles up as a religious leader revealed that they endorsed the Jubilee Alliance’s resort to God’s intervention for the peaceful co-existence of previously antagonistic communities (Interview, Nakuru, Kenya, 02 November 2015). According to him, it was a window of opportunity to address societal mistrusts, in addition to serving as evidence of the utility of religious interventions in difficult times (ibid). From this viewpoint, discrediting the ICC’s prayer rallies was not a necessity if they were at the forefront of bringing together warring communities (ibid). Building on the neo-Pentecostal or born-again discourse, the Alliance propagated narratives in which Kenya was under redemption of past transgressions, being born again, which also manifested Kenyans’ wishes to overcome the tragedy of the 2007/2008 events (Deacon 2015, 200).

Given the Jubilee Alliance’s proclamations of restoring relations between the Kikuyu and Kalenjin, its failure was associated with conflict risks. Towards the 2013 elections, there were apprehensions that in case the collapse of the Alliance would reinvigorate the narratives of differences between the communities, and lead to new waves of violence (Lynch 2014a, 100). As a result, the majority of the Kikuyu and Kalenjin were determined to make the Jubilee Alliance hold, which included electing Kenyatta and Ruto into office despite their ongoing ICC cases.

Therefore, a common thread among the majority Kikuyu and Kalenjin was the suggestion that since they had opted for peace and reconciliation, they should be left alone to ‘forget’ and ‘move on.’ In this vein, a Kikuyu youth narrated how the community had ‘forgotten,’ desired peace and were bearing with impunity because they wanted the Alliance to stand (Interview, Kiambu, Kenya, 30 November 2015). For a Kalenjin politician, “the communities came together because they easily forgave, listened to elders, accepted and moved on” (Interview, Nairobi, Kenya, 15 October 2015).

To a significant number of the Kikuyu and Kalenjin, the ICC’s continued prosecutions of Kenyatta and Ruto was counter-productive for peace. In this strand of narrative, there were arguments that the Court’s prosecutions threatened the ideals of the new constitution, and the country’s territorial integrity and stability. For instance, a Jubilee Alliance supporter proclaimed how the ICC posed a greater threat to the country’s sovereignty and peace than “the horrifying trinity of the Al-Shabaab terrorists, the cattle rustlers of the north Rift and poisonous second-generation brews” (Kagwanja 2015a, 1)

Perhaps, finding a silver lining after Kenyatta and Ruto’s electoral success despite their ICC predicaments, Ocampo took notice of their utility of peace messages. During an interview with Radio Netherlands, Ocampo talked of Uhuruto’s alliance as a representation of their communities’ reconciliation processes (Ocampo, 2014). Ocampo also lamented at the silence of the Jubilee Alliance’s foremost rivals in the elections on the PEV or the ICC (ibid). According to Ocampo, Kenyatta and Ruto were

elected in 2013 due to their unrivalled address to very pertinent issues for Kenyans (ibid).

With the Jubilee Alliance's intensification of the logic that the ICC trials were at the behest of external interests and their domestic sympathizers, they solidified their domestic local bases. Thus, for the majority of their supporters, the neo-colonial narrative deflected the ICC's retribution as a remedial action for the 2007/2008 PEV. Besides, the AU and other individual African countries were also supportive of the Jubilee Alliance's neo-colonial connotations of the ICC.

#### **3.4.2. 'Bringing Africa in'**

In addition to its domestic consequences, the neo-colonial narrative courted the AU's and some individual African leaders' solidarity with the Kenyan ICC cases. In so doing, the narrative Africanized Kenyatta and Ruto's predicaments, thus elevating their battles with the Court to the regional platform.

Explaining their turn to Africanization, a Jubilee Alliance activist argued that "the ICC is a big giant which they could not confront on their own and hence the need to get the help of African leaders" (Interview, Nairobi, Kenya, 25 September 2015). 'Bringing Africa in' was also informed by the little success of the worldwide shuttle diplomacy on the cases' deferral, which went hand-in-hand with an increased focus on African allies where more progress was made.

With imminent trials at The Hague, Kenyatta influenced the convening of an Extraordinary Session of the Assembly of the AU in October 2013. At the session, Kenyatta invoked the Pan-African spirit of solidarity, before proceeding to conflate the

ICC's forays on the continent with neo-colonialism (PSCU, 2013). In a passionate and emotive speech, Kenyatta talked about African renaissance, and the Court's intrusion in the continent at the instruction of former colonial powers (ibid). Kenyatta lamented at the ICC's focus on African cases despite the commission of international crimes in other regional spaces (ibid, 4). Imploring African solidarity on his and Ruto's ICC cases, Kenyatta noted that:

Kenya looks to her friends in time of need. We come to you to vindicate our independence and sovereignty ... This is the forum for us to unite and categorically vindicate our sovereignty ... I have utmost confidence that this Assembly's voice will be clear to the entire world. (PSCU 2013, 4)

Consequently, the neo-colonial accusations compelled African solidarity on the Kenyan cases, as they reinvigorated claims of the continent's peripheral location in the global political economy. Collective action was therefore envisaged to provide the impetus to African protectionism, and assertions of the continent's relative power in the global order.

Earlier on, Kwame Nkrumah, an AU founding member, and former Ghanaian president, had cautioned Africans about the dangers of neo-colonialism. Hence, the connotation of the ICC with neo-colonialism brought to the fore Nkrumah's (1965, 1) description of neo-colonialism as "the last stage of imperialism, and perhaps its most dangerous stage." According to Nkrumah, neo-colonialism is underpinned by theoretical assumptions of states' independence and "outward trappings of international sovereignty;" as well as outside economic and political directions (ibid, 1). In this light, the ICC's reintroduction of neo-colonialism would negate Africans'

statuses as independent, and increased feelings of human indignity that pervaded the colonial era.

In perspective, the neo-colonial narrative proclaimed an anti-ICC logic, with undertones of the Court's manipulation by the West and distance from Africa. The narrative befitted the belief that the ICC was embedded in geo-political contests for hegemony as manifested in the West's imposition of its justice on others (Kagwanja 2015b, 144-145). Seen from this angle, the ICC was to be understood as a "toy of declining imperial powers" and an instrument of advancing Western hegemony (PSCU 2013, 3-4).

Furthermore, African criticisms of the ICC conceived the continent as a site for experimenting with Western neo-liberalism. Undeniably, it is only in Africa where the ICC has intervened under all its three trigger mechanisms, despite the evidence of other global conflicts. As Mutua (2016, 49) opines, the ICC's focus in Africa fed into perceptions of the continent's depiction as "a tabula rasa or a blank slate on which" to inscribe Western logic and institutional models (Mutua 2016, 49). Similarly, Kenyatta decried how the Court's focus alluded to Africa as a "third-rate territory of second-class peoples," and Africans as "a project, or experiment of outsiders" (PSCU 2013, 4).

Echoing Kenyatta's sentiments, the then Kenya's Ambassador to the UN, Macharia Kamau, warned of the dangers of drawing binaries between perceived owners and proponents of the ICC, and subjects to which the Court was created (Kamau 2016, 3). Additionally, a senior government official took reference of Judge Kaul's dissenting opinion on the Kenyan cases to question the ICC's motion in the country, unlike other



countries with more gravity (Interview, Nairobi, Kenya, 21 November 2015). Likewise, a Kenyatta supporter questioned “Ocampo’s enthusiasm and zeal to malice Kenya as an example, which only exhibited his sectarian interests” (Matsanga 2012, 1). The Kenyan cases were also attributed to judicial activism, in the OTP’s determination to use the country for institutional legitimation (Kagwanja 2015b, 151). Regionally, there were arguments of how the Kenyan cases were indicative of global imperialism in a broader game of embarrassing African political leaders, as their resources are exploited (Yeebo 2012, 1). So, in salvaging Africa’s sovereignty and dignity, the AU took notice of the Kenyan ICC predicament. The regional body adopted a more assertive and collective voice in its dealings with the Court, especially on Kenyatta’s and Ruto’s cases.

#### **3.4.2.1. Renewing African protectionism**

African protectionism resulted in the mantras of African solutions for African problems, which encompassed the AU’s policy positions on non-cooperation with the ICC regarding Kenyatta’s and Ruto’s cases. In a 2013 address to the UN General Assembly regarding Uhuruto’s trials, Museveni decried their ICC’s mishandling and reminded the international community about one of the de-colonization slogans of “Africa for the Africans” (Museveni 2013, 1). Further, the Ugandan president reminded the Assembly of African patriotic forces’ intentions of acting accordingly against hegemonism (ibid).

Museveni’s sentiments were shared by several African leaders as revealed in their almost unanimous declarations and decisions on non-cooperation with the ICC. At the height of the 2013 summit, the then AU chairman, Hailemariam Desalegn, lamented

the ICC's degeneration into "some kind of race hunting" despite its initial motives of fighting impunity (cited in Daily Nation 2013b, 1). Desalegn's choice of the phrase "hunting Africans" was evocative – it brought to the fore some of the horrors and images of the West's subjugation of Africans (Mutua 2016, 48). It was therefore ironical that the ICC was accused of committing some of the unspeakable crimes it was created to deal with (ibid).

More assertively, the AU reiterated its reservations on the ICC's politicization and the skewed indictment of African leaders, and the continued trials of Kenya's sitting President and his Deputy (AU 2013, 2). Consequently, the AU decided that Kenyatta and Ruto's charges should be terminated until the end of their term in office, and that the UNSC should listen to AU's demands (ibid). The regional body also reaffirmed its earlier decisions on Sudan and asserted that no sitting AU head of state would be subjected to any international court or tribunal, in order to "safeguard the constitutional order, stability and, integrity of Member States" (ibid).

Although the AU policy positions were unsuccessful in case terminations, regional solidarity helped to moderate the ICC's dealings in respect of the Kenyan charges. As a journalist who followed the Kenyan cases revealed, the ICC was restive during the 2013 AU summit, and the Court's registrar requested Africa against taking any drastic decisions, but raise their concerns during the next ASP meeting (Menya 2016,1)

Furthermore, at an ASP meeting in 2013, the AU succeeded in pushing through amendments to the Rome Statute's rules of evidence and procedure. The amendments allowed Kenyatta and Ruto to be excused from continuous appearance at the ICC due to their state responsibilities (ICC, 2013). Regional solidarity also enabled Kenyatta

and Ruto to effectively resist the OTP's attempts to use the amended Rule 68, which allowed admission of recanted evidence in cases of witness interference, in Ruto and Sang's case (Obala, 2015; Makana, 2015).

Moreover, the AU adopted Kenya's proposal for Africa's collective withdrawal from the ICC. While campaigning for the proposal, Kenyatta called upon Africa to send a powerful message in defiance to a system that disregards sovereignty and African dignity (PSCU 2016a, 1). However, as a Jubilee Alliance insider revealed that "somethings are done for the moment and Kenya was not keen on leaving the ICC" (Interview, Nairobi, Kenya, 9 February 2016). He believed that the AU posturing on Africa's mass withdrawal was more about influencing decisions (ibid).

Despite a commanding majority in the National Assembly and control of government, the Jubilee Alliance did not follow proactive steps to withdraw Kenya from the ICC despite its perceived neo-colonial agenda. Probed on withdrawal, Kenya's Foreign Affairs Minister denied any intentions of leaving the ICC, but reforming it (Ilado, 2016). The minister also observed that the ICC is a "Kenyan Court and treats its as such" (cited in Sanchiz, 2015). Similarly, on numerous occasions, Kenyatta has called for the ICC's reform, and refrained from calling for Africa's withdrawal from the Court (Anderson and Smith, 2016).

After Sang and Ruto's cases were terminated in April 2016, marking the final collapse of all the 'Ocampo Six' cases, Kenyatta thanked the AU for its solidarity in the Kenyan cases (PSCU 2016b, 1). According to Kenyatta, the country's success with the ICC cases was due to the "strong position taken by the AU and its member states" (ibid, 1). Kenyatta also said that the country would "continue partnering with other countries in

the continent to achieve Africa's agenda" (ibid, 1). As he concluded, unity of purpose and a Pan- African spirit would champion the continent's interests within the global power system (ibid, 1).

The chairman of the Defence and Foreign Affairs Committee in parliament, Ndung'u Gethenji, remarked that "Kenyatta celebrated the 2013 election as a moment where the Kenyan people had stood up to foreign interference, rekindled the Pan-African spirit and reconceptualised African solidarity" (Gethenji 2016, 1). In his view, Kenyatta's approach paid dividends in the face of the worries that the ICC cases presented, such as international isolation. Gethenji concluded that under similar circumstances, "most African presidents getting into power would have grovelled at the feet of the international community and begged to be accepted into the community of world leaders" (ibid).

In sum, the Jubilee Alliance's pragmatic politicization of the ICC's intervention enabled them to overcome the Court's moral agency in local spaces, besides evading its reach by turning to regional solidarity. With regards to the latter outcome, the Alliance reduced non-compliance risks as the AU's collective actions moderated the Court's actions on Kenyatta's and Ruto's cases.

### **3.5. Conclusion**

It is thus clear that domestic political elites' translations of international criminal interventions in their realms condition the shape of other actors and institutions' uptake in diverse spaces. More worrying is the political elites' orchestration of transactional and adversarial exchanges on the ICC's interventions. This is instructive of the phenomena of glocalization of ICJ, which results in the blend of local and global

perspectives, with unique outcomes as demonstrated by the Ugandan and Kenyan cases.

As the chapter has illustrated, the GoU's orchestration of transactional exchanges culminated in the ICC's selective focus on the LRA. This resulted in the options of selection bias with conditional cooperation on the ICC's universality of justice or alternatives to the Court in annihilating the LRA. In a similar vein, the Jubilee Alliance's adversarial exchanges with the neo-colonial narratives had multiple outcomes: shifting attention from the ICC's utility to local agency in addressing the 2007/2008 PEV, questioning the Court's frames of justice, and courting regional solidarity as an impetus for protectionism.

Notwithstanding the GoU's and the Jubilee Alliance's orchestration of transactional and adversarial exchanges on the ICC's interventions, local spaces are contested sovereignties in which there are constant struggles over international intrusion. The next chapter explores the phenomena of domestic normative contestations over ICJ, and the salience of the narratives as a continuation of glocalization.

## Chapter 4

### **Overcoming domestic normative contestations over international criminal justice**

Within Uganda's and Kenya's domestic realms, there were robust normative contestations over the ICC's intervention, that were similarly overcome by the GoU's selective referral and the Jubilee Alliance's neo-colonial framing. In other words, a combination of competing conflict narratives and the existence of multiple actors and institutions implied that besides the GoU and the Jubilee Alliance, other actors and institutions equally contested domestic uptake of ICJ. Some other interested parties that were directly involved with the ICC's interventions in the two countries were: victims, affected communities, governance and human rights activists, religious groups, representatives of international NGOs, Western diplomats, and government officials.

Whereas calls for the universality of justice presupposed a balance of power between the LRA and the GoU, the former's referral to the ICC unsettled the relative power equilibrium that existed between the two antagonistic parties. After the referral, the LRA was disempowered with the ICC's stigma, as the GoU was empowered as an actor whose cooperation was expected in the moral universe. Furthermore, the site of domestic normative contestation over ICJ was shifted to the LRA, given the ICC's subsequent focus.

In a similar vein, the Jubilee Alliance's neo-colonial narrative alienated the ICC and its sympathizers from the Alliance's domestic support base. In so doing, the narrative persuaded targeted local constituencies to elect the Jubilee Alliance while delegitimizing the ICC. The narrative also gained concessions from some of the Court's

supporters, such as the Jubilee Alliance's main political opponents in the Coalition for Reforms and Democracy (CORD), Western diplomats as well as governance and human rights activists.

This chapter discusses the salience of the narratives in overcoming domestic normative contestations over ICJ to further attest to the critical challenges they pose to the ICC's moral authority. In this regard, the narratives are indicative of subtle and sophisticated ways under which the Court is undermined in domestic spaces by some of the political elites.

The remainder of this chapter is organized as follows. The next part sets the scene on domestic normative contestations over ICJ in Uganda and Kenya. It discusses the array of actors and institutions that either supported or opposed the ICC's interventions, as well as competing conflict narratives amongst antagonistic parties to the conflicts. The chapter then turns to the salience of the GoU's selective referral and the Jubilee Alliance's neo-colonial narratives in overcoming domestic normative contestations over the ICC's interventions. The chapter then concludes with a brief summary of the foregoing discussions, and also draws some implications of the narratives for long-term peace-building in national and regional spaces.

#### **4.1. Domestic normative contestations over international criminal justice**

During the course of Uganda's northern conflict and Kenya's 2007/2008 PEV, and the ICC's subsequent interventions, several actors and institutions negotiated, contested and departed on mechanisms of transition to long-term peace. This was because of varying worldviews and competing conflict narratives amongst a multiplicity of actors and their supporters. The plethora of actors and institutions that were involved in

domestic discourses on the ICC's involvement included: governance and human rights activists, religious groups, victims, government officials, Western diplomats, political elites, and representatives of INGOs.

For the Ugandan situation, contestations on the ICC's intervention followed the conflicting and competing conflict narratives amongst the NRM regime, the LRA and their respective support bases. Thus, there were differences of opinions on whether the ICC should intervene in the conflict, and if so, who was to be held accountable for the atrocities.

Similarly, in the Kenyan situation, the majority of the Kikuyu and Kalenjin – Kenyatta's and Ruto's co-ethnics – differed in their explanations for the 2007/2008 PEV and responsibility for the violence. Moreover, the ICC was supported by the Jubilee Alliance's main opponents in CORD, and many of their supporters, who predominately hailed from the Luo, Luhya, Kisii and coastal communities. Some other proponents of the ICC included Western diplomats as well as many governance and human rights activists.

#### **4.1.1. Questions on the International Criminal Court's intervention in Uganda**

The ICC's involvement in Uganda coincided with ongoing local efforts to end the northern conflict via several peace initiatives. Spearheaded by Acholi religious and cultural leaders, the peace mechanisms (amnesty, traditional justice and mediation) roped in many northern based civil society organizations (CSOs), the GoU and the international community.



For example, the amnesty process was not only supported in the north, but it also attracted funding from the AU, the World Bank and the United Nations Development Program (UNDP) (Amnesty Commission 2013, 14). Similarly, the Juba peace process was supported by the USA, UK and the UN, and regional actors, such as South Sudan and the AU (Hendrickson and Tumutegereize, 2012).

Significantly, the peace efforts contributed to de-escalation of the conflict, as a large number of LRA combatants took advantage of amnesty proposals, traditional justice and peace talks to return home and rebuild their lives. In addition, the ongoing peace talks in Juba between the GoU and the LRA delegation led to relative calm, as dialogue minimized incentives for militarism.

More importantly, the Juba recommendations of traditional justice in Uganda's TJ trajectory reinforced the utility of such mechanisms in contributing to peace. Several forms of traditional justice among northerners, namely: *Ailuc* (Iteso), *Culo Kwor* (Acholi and Lan'gi), *Kayo Cuk* (Langi), *Tonu ci Koka* (Madi) and *Mato Oput* (Acholi) were defined and designated as integral parts of accountability and reconciliation (Republic of Uganda, 2007a). The various traditional rituals are performed to reconcile formerly warring parties, after exhausting options for accountability (ibid, 2).

The inclusion of various forms of traditional in the final peace settlement instilled in them relative authority and legitimacy in nurturing Uganda's post-conflict transition. In contrast, the ICC's entry into the fray was a formidable challenge to the utility and recognition of local mechanisms that had been tried and tested over times. Hence, to a significant number of Ugandans, especially in the north, local dynamics predisposed the ICC's intervention as an unnecessary disruption of ongoing peace-building efforts.

As a senior official of the Kampala based Refugee Law Project (RLP) summarised, the ICC's entry in Uganda halted vibrant local TJ processes that were ongoing, given that substantial resources and attention shifted to prosecutorial mechanisms (Interview, Kampala, Uganda, 27 January 2016). Moreover, as he alluded, before the ICC's intervention, an Amnesty Act and traditional leaders "were at the centre of everything" (ibid).

According to Acholi religious and cultural leaders, the ICC's intervention was a worrying concern. As a religious leader narrated, their stand was that the arrests should be postponed, and it was unwise to arrest Kony and others, owing to their prominent roles in the Juba peace mediation (Interview, Gulu, Uganda, 30 March 2016). Similar concerns were shared by an Acholi cultural leader, with arguments that the ICC's intervention prolonged the conflict due to Kony's fears of arrest, continued stay in the bush and commission of atrocities (Interview, Gulu, Uganda, 21 March 2016). Thus, he posed: "We challenge it [ICC]. If you talk about arrest, you should arrest him. What is the use of the law? If it does not work, it becomes no law. It was not timely" (ibid).

For the Acholi religious and cultural leaders, the ICC's intervention undermined the mix of ideas and strategies they had proposed and enacted over the years, which significantly contributed towards relative peace in the north (Interview, Acholi religious and cultural leaders, Gulu, Uganda, 21- 30 March, 2016). Indeed, as a result of their efforts, many LRA combatants abandoned rebellion and returned home (ibid). It was also their pressure and diplomacy that persuaded the GoU to agree to the mediation process in Juba between 2006 and 2008 (ibid).

Collectively, under the Acholi Religious Leaders Peace Initiative (ARPI), the clergy's stand was slowing the ICC's intervention, and if possible, postponing the idea of indicting the LRA (Interview, Acholi religious leader, Gulu, Uganda, 30 March 2016). According to them, the LRA were key parties in the peace negotiation, and their arrest would kill the talks (ibid). Consequently, they rejected the path of accountability and justice (ibid).

Some local CSOs and pressure groups also questioned the timing of the ICC's process. For instance, Refugee Law Project commended the ICC's investigation, but questioned the wisdom of intervening in an ongoing conflict (RLP 2014,1). The organization's judgement was premised on the belief that the Court's intervention would motivate the LRA to continue the cycles of violence and human rights violations (ibid). In addition, RLP was concerned about the feasibility of peaceful resolutions to the conflict with active arrest warrants against the insurgents (ibid).

Apart from the timing of investigations, the ICC was also confronted with questions on who bore the greatest responsibility for the violence. These stemmed from competing conflict narratives between the GoU and the LRA, and their respective support bases. Concurring with these contestations, a prominent human rights activist observed how "there is no one or two causes of the conflict, but multiple factors based on history, perceptions and real things that happened" (Interview, Kampala, Uganda, 3 February 2016). Overall, the competing narratives revolve between the extremes of the LRA's description as a ruthless religious and criminal organization, or revolutionary forces in defence of northern Ugandans that suffered Museveni's wars and marginalization (Hendrickson and Tumutegyeize 2012, 12).

As the northern conflict unfolded, it elicited extreme views in the Ugandan society, along the fault lines of the regime and the insurgents' core sympathizers. To illustrate, a government official averred that "there is no solid premise apart from the fact that one group – the LRA – desired to take state power, to address supposedly imbalances and governance questions" (Interview, Kampala, Uganda, 03 February 2016). According to him, "there was no scenario of the NRA's demonstration of bias against ethnic groups" to give them credence for rebellion, but concerted efforts to put away the new government before it consolidated power (ibid). Consequently, he concluded that "two forces arose: a government with values on the one hand, and rebels on the other" (ibid).

With regards to accusations of the government's complicity in committing atrocities in IDP camps, the government official wondered how they sought to protect people, but at the same time, they were accused of harming them (ibid). These claims were corroborated by a senior UPDF official, who noted that the LRA got access to some of their uniforms and committed atrocities while disguised as government soldiers, such as the Barlonyo IDP camp attacks in February 2004 that led to approximately 200 civilian deaths. As a former senior NRM official, opined, the UPDF was fighting insurgents, and therefore cannot be accused unless there is evidence that they committed crimes (Interview, Kampala, Uganda, 16 December 2015). Another government official argued that the conflict was politically motivated to capture power through violence, and there is no evidence on alleged regime marginalization, as the north has enjoyed power more than any other region (Interview, Kampala, Uganda, 4 February 2016).

Departing from the regime's narrations, the majority of the Acholi believed that the conflict's genesis was the NRM's provocation and persecution of former Acholi soldiers. This, according to them, informed the regime's responsibility for the ensuing atrocities. According to many Acholi, the LRA insurgency was also exacerbated by perceived marginalization of the north and militarization of the Acholi economy. In this regard, an Acholi elder suggested that the LRA original founders were blessed by some Acholi elders from the Payera and Palabek clans to fight the north's repression (Interview, Gulu, Uganda, 25 March 2016).

Given the accounts of the regime's repressions in the north, the LRA attracted considerable support from some sections of the population. As an Acholi academic posed, "people were caught between a rock and a hard place, the UPDF put them in camps, so people died there. Which was the bigger evil to people on the ground?" (Interview, Kampala, Uganda, 13 January 2016).

An Acholi elder posited that the occurrences in the north took a shift towards proxy wars between Uganda and Sudan, and hence extended beyond the concerns of local interests and issues (Interview, Gulu, Uganda, 21 March 2016). These perceptions about the conflict's external participants fitted with the majority of the Acholi's convictions of provocations with the violence, and consequent non-responsibility for its unfortunate repercussions.

Within the logic of the violence's rationalization amongst the majority of the Acholi, the amnesty path was a natural choice, as opposed to criminal accountability. Further, as they suggested, any deliberations on pursuing criminal justice were to be predicated on focusing on both sides to the conflict – the GoU and the LRA (Interview, Acholi

elders, Gulu, Uganda, 21-30 March 2016). A human rights activist opined that the Acholi community had evidence of alleged government atrocities, “so they would rather see a comprehensive and impartial process to hold both sides accountable” (Interview, Kampala, Uganda, 27 January 2016). Similarly, for an Acholi religious leader, “whether crimes were committed by the GoU, individuals, the LRA, all should be investigated” (Interview, Gulu, Uganda, 30 March 2016).

Besides the Acholi sentiments on the universality of justice, other observers called on both sides to the conflict to be investigated. For instance, a Ugandan lawyer suggested that due to the reality of two warring parties, there were legitimate concerns that each of the sides committed atrocities (Interview, Kampala, Uganda, 15 December 2015). Human Rights Watch (2004, 1) also regretted “many shocking abuses by the LRA” as well as the crimes allegedly committed by the government troops.

Equally contested was the place of child soldiers in the raging debate on ICJ. Given their nexus between perpetrators and victims, there were questions on whether to prosecute them as a result of the former identity, or whether they deserved amnesty in consideration of their latter position. As perpetrators of serious atrocities, the LRA combatants were to be investigated for their alleged criminality in accordance with the ICC’s statute. Conversely, as victims of forced abduction, there were arguments that “the family and government did not protect the child, everybody gave the child out, and so the child victim did not deserve double punishment” (Interview, Acholi elder, Gulu, Uganda, 22 March 2016).

Nearly similar events of domestic normative contestations followed the ICC’s intervention in Kenya’s 2007/2008 political crisis. The Kenyan scenario unfolded

along the lines of competing conflict narratives amongst the majority antagonistic Kikuyu and Kalenjin communities, as well as backlashes and support for the Court's interventions in the same measure.

#### **4.1.2. Counter narratives, criticisms and support for the International Criminal Court's intervention in Kenya**

The Jubilee Alliance's battles with the ICC were preceded by two critical precedents. First, there were counter narratives on the 2007/2008 PEV amongst the majority of Kikuyu and Kalenjin communities, which collectively intensified domestic backlashes against the Court. Second, there was considerable support for the ICC by political elites in CORD, their supporters from the Luo, Luhya, Kisii and coastal communities, as well as Western diplomats and governance and human rights activists.

In retrospect, the majority of the Kikuyu and Kalenjin were on opposite sides of the political divide during the 2007 general elections. Some of their members reportedly fought each other, and supported the ensuing violence based on their specific interests and circumstances (Republic of Kenya, 2008). Thus, their explanations for the violence bordered on ethnic antagonisms, accusations of each other as the most responsible, and calls for the prosecution of the other.<sup>12</sup> These developments followed Rabkin's (2005, 755) contention of justice as local, as it is perceived and invoked in different ways.

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<sup>12</sup> Many Kikuyu and Kalenjin interviewees expressed such sentiments.

To illustrate, the majority of the Kalenjin believed that the violence was spontaneous<sup>13</sup> after the controversial announcement of Mwai Kibaki, a Kikuyu, as president. According to this strand of narrative, the youth who were contesting the presidential elections results were provoked with violence, hence should not be crucified at the altars of justice. Conversely, punishment was to be directed at the stolen presidential elections results, which was perpetrated by the Kikuyu political elites.

Amongst the majority Kalenjin, a proclamation of the violence as organized was victimization of the community and an error in judgement. In this regard, Kalenjin respondents complained that the Waki Commission was hijacked by human rights activists based in Nairobi and did not seek local opinions about the PEV (Lynch 2014a, 105). A Kalenjin interviewee opined that many believed that they were not given an opportunity by the Waki commission to submit evidence on the violence, and meetings were hurriedly convened in Eldoret town with earmarked as witnesses (Interview, Eldoret, Kenya, 3 November 2015).

The majority of the Kalenjin believed that the ICC was committing an injustice by relying on the Waki commission, human rights reports, and other secondary accounts of events. Seemingly contradicting the Waki report and its basis for criminal accountability for the PEV, Ruto argued that it was incorrect for the report not to link the violence with the declaration of the presidential election outcomes (Ruto, cited in Daily Nation 2009, 1). According to Ruto, the Waki report focused on people who

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<sup>13</sup> Most Kalenjin interviewees expressed these views.



challenged the elections results and left out the masterminds of electoral fraud (ibid, 1).

Fuelling the Kalenjin discontents with electoral irregularities were associated discourses on historical land injustices in the Rift Valley, the purge of senior Kalenjin officials from Kibaki's government, and fears of further injustices.<sup>14</sup> Hence, targeting the Kikuyu with forceful evictions, killings and destruction of their property in the Rift Valley was part of Kalenjin revenge for 'encroaching on their ancestral land,' and exclusion from government.

In this sense, alleged Kalenjin perpetrators were not to be held accountable for the violence, because they were correcting historical injustices meted against them. This was succinctly articulated in a Kalenjin youth's recollections of justifications for the Kikuyu evictions and killings on their aggression and intentions to dominate others (Interview, Nairobi, 15 October 2015). As the youth further revealed, their leaders were supportive of such sentiments, given that the Kikuyu would take their farms, and thus should always be living in fear (ibid).

Hence, the association of Kalenjin leaders with alleged responsibilities for the violence conferred unto them a hero status, and not stigma within the community's moral compass. A Kalenjin interviewee narrated how after Ruto's ICC indictment, the community embraced him as *Nyinganet*, denoting someone who is bold and brave enough to face any situation and challenges (Interview, Nakuru, Kenya, 2 November 2015). In a similar vein, a Kalenjin politician summed that "Ruto went to the ICC on

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<sup>14</sup> Several Kalenjin interviewees articulated these positions.

behalf of the Kalenjin” (Interview, Nairobi, Kenya, 12 April 2016). Likewise, a Kalenjin youth revealed that Ruto “was a victim of circumstances and the face behind the community’s resistance against the Kikuyu” (Interview, Nairobi, Kenya, 17 February 2016).

The Kalenjin criticisms also benefited from the ICC’s references to the community’s network of businessmen, politicians, youths and elders, as well as cultural practices in the 2007/2008 violence matrix. During Ruto’s opening trial at the ICC in 2013, the OTP argued that the violence was planned and executed by a network of powerful Kalenjin political and business elites, under Ruto’s leadership (ICC 2013, 3). Towards the elections, the OTP asserted, several private and public meetings were organized, in which Ruto assembled the Kalenjin network and allotted roles, raised money, and organized meetings to implement their criminal ventures (ibid, 3). The OTP also argued that Ruto used the community structures to assemble an army and spread hate against the Kikuyu in public rallies and through the mass media (ibid, 3). In so doing, the OTP used circumcision footages during Court proceedings as evidence of Kalenjin preparation for violence (Cheserek, 2013).

Conversely, the majority of the Kalenjin were unhappy with the mention of cultural systems as means of rallying organized militia (Interview, Kalenjin politician, Nairobi, 22 September 2015). As such, the ICC was perceived to be “delivering mob justice” by targeting the whole community’s cultural practices (ibid). As a Kalenjin elder argued, the broadcasting of the initiation ceremonies contravened the sanctity of Kalenjin customs and traditions (Cheserek 2013, 1).

For their part, the majority of the Kikuyu believed that the violence exposed the community to a siege mentality as they were attacked from different fronts: in the Rift Valley by Kalenjins, and in the western region by the Luo and Luhya communities.<sup>15</sup> In this vein, retaliatory attacks that their leaders were accused of were justified. Indeed, the CIPEV concluded that in the North Rift where the Kikuyu were victims, “the violence was more intense, more widespread, was urban as well as rural and lasted longer” (Republic of Kenya 2008, 38). Thus, the majority of the Kikuyu argued that the revenge attacks stopped the violence, salvaged the community from plausible annihilation, and that their leaders should not be held accountable for retaliation.

Further, the majority of the Kikuyu likened the community’s 2007/2008 predicaments to similar events in 1992, 1997 and 2002, where they were also targeted in the Rift Valley. According to them, iteration of violence reinforced arguments that the community was perennially attacked due to their industrious nature and envy from other communities. On this note, a Kikuyu youth recalled that in the 2007 elections, their opponents talked of *madoa doa*,<sup>16</sup> implying a sense of the community as a soft target because they are hardworking,<sup>17</sup> “people felt jealous of them, and wanted to grab their hard-earned wealth” (Interview, Kiambu, Kenya, 30 November 2015).

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<sup>15</sup> Most Kikuyu interviewees articulated this position.

<sup>16</sup> Swahili corded word for unwanted people.

<sup>17</sup> The Kikuyu are locally known for their entrepreneurial spirit.

Therefore, the majority of the Kikuyu premised their quest for justice on losses of property, land and community members, which they believed would guarantee non-repetition. With domestic inaction, some of the Kikuyu political elites and their supporters demanded for justice for the victims of the PEV, including at the ICC.

For instance, during a public address in the aftermath of the violence, Kenyatta called for the ICC's prosecution of alleged perpetrators of the violence (KTN, 2016). Additionally, a Kikuyu politician revealed that support for the ICC obtained from the inability of Kenyan courts to deliver justice for victims due to the backlog of cases and political interference (Interview, Nairobi, Kenya, 29 September, 2015).

Nonetheless, the Kikuyu embrace of justice had a caveat: a focus on their perceived enemies; namely, the Kalenjin and the ODM leadership who were believed to have provoked the violence. From a leaked American diplomatic cable, a Kikuyu MP revealed that many believed that the community's leaders who were implicated in the violence acted as self-defence and therefore "should not be equated with Rift Valley organizers" (Wikileaks 2008, 1).

Consequently, the ICC's indictment of Kenyatta reinforced his position as a defender of the Kikuyu community. In turn, the majority of the Kikuyu professed Kenyatta's innocence, and rebuked his ICC's trials as unjust and unwarranted. For instance, a Kikuyu youth observed that Kenyatta's prosecution accelerated his hero status and gave him credit for the community's defence (Interview, Kiambu, Kenya, 30 November 2015). Likewise, a Kikuyu teacher argued that Uhuru was never expected in the list of suspects, but Odinga and some Kalenjins (Interview, Kiambu, Kenya, 30 November 2015).

Some popular Kikuyu musicians, notably Kamande wa Kioi and Muigai wa Njoroge, composed songs in praise of Kenyatta while castigating the ICC and some of its supporters. Njoroge's (2012) 'Hague bound' song accused Kenyatta's political opponents for his woes and claimed that judges were biased. On the other hand, Kioi (2012) used a biblical allegory to liken Kenyatta to Moses, who was anointed by God to deliver the community from Egypt to Canaan.

Collectively, the competing conflict narratives amongst the majority of the Kikuyu and Kalenjin, and counter accusations on alleged responsibility, complicated Uhuruto's battles with the ICC and political ambitions. Uhuruto's predicaments were compounded by significant domestic support for the ICC by CORD and its Luo, Luhya, Kisii and coastal supporters, several governance and human rights activists and Western diplomats. More importantly, domestic support for the ICC added a rider to local narratives under which the majority Kikuyu and the Kalenjin rationalized the PEV: atrocity crimes were committed and had to be punished under international law.

During the PEV's timeline, some governance and human rights activists congregated under Kenyans for Peace with Truth and Justice (KPTJ), for concerted efforts in collecting and preserving evidence, contemplating long term solutions for the crisis, and pursuing justice. As a former KPTJ official reiterates, "they began thinking about the potential involvement of the ICC, asked about it through proxies and began putting together information on the nature of the violence" (Interview, Nairobi, Kenya, 22 September 2015).

Although the idea of ICJ was initially meant as a threat for catalyzing domestic prosecutions, it became KPTJ's default tool and framework for confronting impunity

after glaring demonstrations of domestic inability and unwillingness (ibid). The KPTJ subsequently shaped domestic discourses on the violence by their insistence on “truth and justice” for the presidential elections and violence as conditions for lasting peace (KPTJ 2015, 1).

Over time, KPTJ consistently countered the Jubilee Alliance’s backlashes on the ICC, enhanced victims’ participation in proceedings, collected and collated evidence and increasing the Court’s visibility through advocacy.<sup>18</sup> At the international stage (ASP meetings and the ICC trials), KPTJ countered the government’s narratives on cooperation with the ICC and domestic investigative efforts.<sup>19</sup> More so, in the run up to the 2013 elections, KPTJ challenged Uhuruto’s candidature in a Supreme court petition (which was dismissed) under the integrity clause of Chapter Six of the new constitution.

The Jubilee Alliance’s main rivals in CORD also opposed the Alliance’s anti-ICC rhetoric on many occasions. Prior to the formation of the Jubilee Alliance, Kenyatta and Ruto’s allies in the PNU wing of the coalition government contemplated withdrawing Kenya from the Rome Statute, deferring the cases or terminating them altogether. In turn, key players in CORD opposed such efforts in national platforms and wrote to the UNSC not to act on the deferral requests.<sup>20</sup>

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<sup>18</sup> Views collected from interviews with KPTJ officials in Nairobi, Kenya.

<sup>19</sup> Ibid

<sup>20</sup> Views collected from interviews with CORD officials in Nairobi.

Towards the 2013 elections, CORD partly campaigned on the platform of Uhuruto's unsuitability for elections. CORD's presidential candidate, Odinga, called on Kenyatta and Ruto on numerous occasions to first clear their names before running for elections. In a televised presidential debate in February 2013, Odinga chided Kenyatta's presidential bid, stating how "it would pose a challenge to run a government via Skype from The Hague" (Citizen TV, 2013).

Besides, Western diplomats expressed their support for the ICC's processes in Kenya as a policy position from their home countries. Due to the probabilities of Uhuruto's election, the diplomats hinted at the plausibility of Kenya's international isolation. For instance, in February 2013, the USA's Assistant Secretary of State, Johnnie Carson, in a telephone briefing with journalists, stated thus: "We live in an interconnected world and people should be thoughtful about the impact that their choices have on their nation. Choices have consequence" (Joselow 2013, 1). Similarly, the UK High Commissioner to Kenya, Christian Turner, stated that there would be no contacts with ICC suspects should they win elections, unless it is essential (Anami 2013, 1).

Owing to the West's pronounced support for the ICC's trials, there were concerns that Kenya would suffer from international isolation should the 'alliance of the accused' win the 2013 elections. There were also public discussions on the possibilities of the suspects' imprisonment during their terms in office, and whether they would step down if convicted.

These concerns raised questions on Uhuruto's suitability to hold public office, including from their Kikuyu and Kalenjin co-ethnics. Specifically, Kikuyu voters faced the dilemma of voting for Kenyatta and Ruto, while they still faced criminal charges

(Burbidge 2014, 218). Similarly, Donald Kipkorir, a prominent Kalenjin lawyer dissuaded Kenyatta and Ruto from running for office on the belief that they would jeopardize Kenya's road to success and actualization of the Vision 2030 economic blueprint (Kipkorir 2012,1). According to Kipkorir, electing the two suspects would enlist Kenya in the pariah group of states and confine it to diplomatic and trading relations with Eritrea, Sudan, North Korea, Zimbabwe and Syria – a path that should be avoided (ibid, 1).

From the foregoing discussions, Uganda's and Kenya's orientations as contested sovereignties raised normative questions on who should be prosecuted by the ICC, and the moral basis for the Court's prosecutorial discretions. In turn, the GoU's selective referral of the LRA to the ICC, and the Jubilee Alliance's neo-colonial narratives unlocked such normative contestations over ICJ. Whereas the selective referral unsettled the relative power equilibrium between the GoU and the LRA, the neo-colonial narrative alienated the ICC and its sympathizers from the Jubilee Alliance's domestic support base.

#### **4.2. Unsettling the relative power equilibrium between the Government of Uganda and the Lord's Resistance Army.**

Calls for the universality of justice and competing conflict narratives between the GoU, the LRA and their respective supporters presupposed a relative power equilibrium between the GoU and the LRA. Although the insurgents' crimes were more intense after the ICC's establishment in 2002, there were instances of alleged government atrocities that increased the risks of investigating both sides to the conflict.



More interestingly, even the regime acknowledged some of their culpabilities in the conflict. For example, in October 2012, Museveni succumbed to pressure from northerners and openly apologized for the army's massacres in the region (Eriku and Kwo 2012, 1). In his apology, Museveni blamed alleged government atrocities on "bad elements" in the NRA (ibid, 1). There have been similar incidences of the government's apologies during the NRM's annual anniversary celebrations (see for example Walubiri, 2014).

As such, the Ugandan scenario exemplifies the balance of power that involves pluralism and hostilities, and the struggle for power that unfolds in two waves: "competition and direct opposition" (Morgenthau's (1948, 239). With the selective referral of their military/political opponents to the ICC, the GoU perfected their direct opposition to the LRA in competition for post-conflict legitimacy.

Simply put, the selective referral unsettled the relative power equilibrium that pervaded Uganda's domestic normative contestations over ICJ. As one interviewee summed, the referral was a working relation between the ICC and the GoU, in which the LRA had no voice (Interview, professor, Kampala, Uganda, 13 January 2016). In this sense, the LRA was portrayed as "where the problem was, and were the perpetrators, and it was the north in which the victims were" (ibid).

In other words, the referral partially put to rest some domestic normative questions, particularly concerns on: alleged responsibility for the violence, and the location of suspects and victims. Therefore, answers to the questions were to be found in the LRA and their alleged atrocities. Pursuant to the referral, the site for domestic normative

contestations over ICJ also shifted to the LRA – the subsequent focus of the ICC’s investigations and prosecutions.

#### **4.2.1. Partially resting domestic normative questions on the northern conflict**

In the post-referral era, several domestic normative questions with regards to the northern conflict were partially put to rest, as shaped by the attendant shifting power relations. For example, questions on alleged responsibility for atrocities found immediate answers in the LRA’s top leadership.

After the referral and subsequent prosecutorial steps, the OTP observed that there was sufficient evidence to believe that Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ong’wen ordered the commission of crimes within the ICC’s jurisdiction (ICC 2005d, 2). Subsequently, in October 2005, the Court unsealed the LRA leadership’s warrants of arrests, on the belief that they had established a systemic pattern of brutality aimed at the civilian populations and the Ugandan army (ibid, 2).

Moreover, the ICC’s investigative steps overrode the concerns for assuaging the LRA’s submission to peace processes. As a result of Uganda’s acceptance of the Court’s jurisdiction, domestic authorities were expected to enhance state cooperation at local and international levels, for an effective war on impunity for the crimes that the LRA were accused. The GoU’s cooperation would therefore include collaborating in arresting the indicted LRA soldiers and commencing complementary national trials for many other alleged perpetrators.

Conversely, the LRA’s cooperation entailed surrendering and attending trials at The Hague. In one of her public appeals, Bensouda “called on Joseph Kony to hand himself

in and face justice,” failure to which the OTP would continue to pursue his arrest (ICC 2016a, 1). In the end, fears that the trials would disrupt local peace efforts were alienated by the growing support for justice and calls for international cooperation towards prosecutorial outcomes.

For their part, some of the ICC’s officials responded to demurs on selection bias with equivocations on gravity thresholds, and insufficient evidence on alleged regime atrocities. Explaining prosecutorial discretion, Ocampo (2005, 3) argued that after the OTP’s analysis of the gravity of crimes committed by both parties, it emerged that the insurgents’ crimes had higher gravity than the UPDF’s. On Olara Otunu’s<sup>21</sup> assertion that alleged government atrocities should be equally investigated, Ocampo challenged Otunu to present evidence to the ICC (New Vision, 2010). Similarly, a Kampala based ICC official suggested that if individuals have evidence on regime atrocities, they should present it to the OTP (Interview, Kampala, Uganda, 2 February 2016).

Even so, the ICC official cautioned that communications alone from individuals do not guarantee prosecution, but sufficient threshold (ibid). At a media briefing in Gulu in 2016, the ICC’s head of Jurisdiction, Complementarity and Cooperation Division (JCCD), Mochochoko Phakiso, also responded to local complaints on selection bias that “whoever has evidence against the UPDF to come forward” (cited in Owich 2016, 1).

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<sup>21</sup> Olara Otunu is a Ugandan opposition politician from the north and former UN Special Representative for Children and Armed Conflict.

Although the ICC officials' pronouncements could be construed as positive gestures and willingness to open up communication channels between the Court and local actors, such an interpretation is potentially misleading. There is no provision in the Rome Statute that expressly bars the OTP from commencing investigations on its own motion. In anticipation of domestic lapses, the drafters of the Statute conferred discretion on the part of the OTP under Article 15. The Article clearly illustrates that "the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court." It also hints at the OTP's discretions on fact-finding from States, the UN's organs, INGOs, or other appropriate and credible sources that might be received orally at the seat of the Court or in writing (ibid).

Perhaps, in awareness of the objections to continuing selectivity, the OTP struck a more conciliatory tone with some members of the affected communities in northern Uganda and implored their patience. During her visit to northern Uganda in February 2015, Bensouda spoke of the slow turn of the wheels of justice, and a need for leaving justice to take its own path (ICC 2015c, 1). Bensouda further requested the communities to embrace the ICC's impartial and judicial process as a pathway to healing, closure for the victims, and guaranteeing non-repetition (ibid).

Besides, the selective referral shifted the burden of contesting the ICC's intervention to the LRA. As the ICC's subsequent focus, the LRA was isolated in the moral universe, given the growing consensus on accountability for atrocity crimes. However, a significant number of the people in northern Uganda were resilient to the ensuing configurations, thus their insistence on alleged government responsibility and amnesty for the LRA.

#### **4.2.2. Shifting patterns of domestic normative contestations**

Two critical junctures in the northern conflict's timeline support the proportion that the selective referral shifted the site of domestic normative contestations over ICJ to the LRA. These are the Juba mediation process in which the LRA negotiated from a weak power position, and the ICC's case developments.

At Juba, the LRA's disempowerment with the ICC's stigma constrained their ability to engage in the talks as assertive actors. As Hendrickson and Tumutegyeize (2012, 6) rightly suggest, the structure of the Juba process wrongly assumed the participation of two partners with adequate abilities and incentives to negotiate. A human rights activist who participated in the talks recalled how, due to the LRA's position, they could not extract good concessions for themselves, thus their focus on negotiations for the people in the north (Interview, Kampala, Uganda, 03 February 2016). Similarly, a senior Acholi politician who was at Juba revealed the LRA delegations' pursuit of social justice, whose essence was the comprehensive solutions in the talks (Mao, 2008a). In this regard, the LRA's position envisaged not only disarmament and reintegration of ex-soldiers, but also on tackling structural causes of violence, which would lead to discourses on the distribution of wealth, power and opportunities (ibid).

More disempowering to the LRA was the onus of negotiating under the constraints of the ICC's indictments and challenging them altogether. As an Acholi religious leader recalls, "Kony was interested in amnesty, but there was voice at the background that the ICC would not allow it" (Interview, Gulu, Uganda, 30 March 2016). The Acholi delegate also reveals that the LRA was interested in amnesty, after seeing people close to Kony such as Brigadier Banya and Colonel Sam Kolo benefit from it (ibid). Another

religious leader recollects how at Juba, they proposed amnesty, to which Kony responded that by 25 December, Christmas day, he would come out and sign as long as the government assured him on safety from arrest, since nobody can go to prison alone (Interview, Gulu, Uganda, 21 March 2016).

Opportunistically, the GoU's side built on the LRA's predicaments to extract maximum concessions from them. The regime proposed the establishment of a special court and subsequent petition to the UNSC for a deferral, albeit under a gentleman's agreement (Wierda and Otim, 2011). According to the agreement, Kony would be incarcerated in the north, under sufficiently flexible conditions "to meet the international requirement for his freedom and movement to be significantly curtailed, while sparing him the humiliation of formal jail in a prison" (Hendrickson and Tumutegyereize 2012, 24). Furthermore, Kony was advised that the agreement's conditions would not be easy (ibid). As such, he was required to trust Museveni, and consent to the language of any public statements of the agreement, that would also be different from the text of the gentleman's agreement (ibid, 24).

Compounding the LRA's shifting power positions were the ICC's subsequent investigations and trials at The Hague. Locally, debates were reinvigorated on what was to be done to child soldiers among the LRA's rank and file. On the contrary, there was little attention to the UPDF soldiers, some of whom were recruited as child soldiers in the army's rank or as village vigilantes against the LRA.

A case in point were controversies surrounding Ong'wen's surrender and transfer to the ICC for imminent trials. Ong'wen's predicaments represented the plight of child abductees/ soldiers. Critical in the 'Ong'wen debates was the idea of the child's agency,

or the ability to act based on personal will, and when it begins or ends (Kasande and Ladisch 2017, 1). Many Ugandans deliberated on the transition from childhood to adulthood, and whether it is marked by age 15 or 18, with overarching conclusions that social conceptions and expressions of a child's agency is contextual (ibid).

More specifically, dissent on the ICC's continued prosecutions of the LRA was pronounced in northern Uganda. As one Acholi religious leader argued, the international community should not punish children, or "killing machines in the hands of the LRA" (Interview, Gulu, Uganda, 25 March 2016). Besides Ong'wen's predicaments, the Acholi remained largely critical of the shifting terrains of positioning the LRA as the site of the northern conflict's atrocities.

With the near international consensus that mass atrocities should not go unpunished, sympathies for the LRA risked the dangers of marginalization. Discussions about the moral universe compass subsumed compassions for suspected war criminals with the ever-growing articulation of intolerance for impunity. Indeed, the GoU succeeded in positioning themselves as dependable partners in combating impunity, of which the LRA were starting points. For Kenya, the Jubilee Alliance's neo-colonial narrative was salient in overcoming domestic normative contestations over ICJ, with different outcomes.

#### **4.3. The Jubilee Alliance's neo-colonial narrative: intentions and impacts**

The Jubilee Alliance won the 2013 elections against the backdrop of Kenyatta's and Ruto's ICC indictments, their respective communities' competing conflict narratives, and considerable domestic support for the Court's process. Although many questions

were raised on the results' credibility, the majority Kikuyu and Kalenjin voted for the Jubilee Alliance and welcomed the results (Lynch 2014a, 104).

The two communities' legitimation of the electoral outcome followed a pattern of individual ethnic communities' attribution of credibility of elections to their everyday realities and expectations, as opposed to technical features of election management (Shah 2015, 45). Seen from this angle, the majority of the Kikuyu and Kalenjin voters were happy with the election results, considering the significant obstacles the ICC's indictments posed to Kenyatta and Ruto, and their overwhelming support for them in the electoral process.

Adding to the Jubilee Alliance's political legitimacy was their clear majority in the National Assembly and a slim majority in the senate (IEBC, 2013). They also gained support from neutral voting zones and obtained more votes in CORD areas than the latter did in theirs (Wolfe 2015, 165).

Whereas the Jubilee Alliance's electoral success in the 2013 elections could be attributed to several factors as discussed in Chapter 3, their neo-colonial narrative was salient in overcoming domestic normative contestations over ICJ. Towards this end, the narrative had multiple intentions and impacts: persuading targeted local constituencies to elect them, delegitimizing the ICC and gaining concessions from some of the Court's sympathizers.

#### **4.3.1. Persuading targeted constituencies to elect the Jubilee Alliance and delegitimizing the ICC**

As a Kikuyu politician observed, "the 2013 elections campaign was not about who was going to do a good job, but about preventing Uhuru from going to The Hague ... The



election recorded the highest turnout” (Interview, Nairobi, Kenya, 23 September 2015). For a Kikuyu elder, the community felt that Kenya had been put under trial by the West, and whoever brought Ocampo, a representative of the West, had the intentions of eliminating some political players (Interview, Kiambu, Kenya, 29 February 2016). In the words of a Kalenjin youth, “the ICC is present-day colonialism ... People were not ready to be taken back by a white man. Nobody understood what ICC stands for” (Interview, Nairobi, Kenya, 2 October 2015). These sentiments show that attitudes were already formed before the 2013 election and affected people’s decisions.

Against the backdrop of competing Kikuyu/Kalenjin conflict narratives and sceptical voters on electing the ICC’s suspects, the Jubilee Alliance’s neo-colonial narrative presented a viable option for overcoming the Court’s moral force. Owing to the ICC’s focus in Africa, the West’s visible support for the Court financially, logistically and in policy positions abroad, and Africa’s history of Western domination (colonialism and slavery) (Hoile, 2014), neo-colonialism found new relevance with the ICC’s intervention in Kenya.

Conflating the ICC’s intervention with Western conspiracies to subjugate Kenya and the wider African continent was important in the Jubilee Alliance’s court of public opinion. With the West’s positioning as a dominant force that aimed to curtail Kenyatta’s and Ruto’s presidency, the Jubilee Alliance promoted anti-Western, and hence anti-ICC logic (Burbidge 2014, 219). Lending credence to such claims, a Kikuyu voter revealed one of his reasons for electing Kenyatta and Ruto as Kenyans’, and Africa’s collective voice of resenting the West and their hypocrisy and double standards (ibid, 220).

More significantly, the neo-colonial narrative presented a safe 'space' in which the Jubilee Alliance could maximize on opportunities for public vituperation of the Court while minimizing threats of antagonizing the Kikuyu and Kalenjin communities. In this vein, the narrative united a majority of sceptical Kikuyus and Kalenjins under the banner of victimhood at the hands of the ICC, and a waning national sovereignty due to Western interference.

Through the neo-colonial narrative, the Jubilee Alliance invoked Kenya's suffering under British colonialism and the struggle for the country's independence under notable nationalists. The six nationalists who were incarcerated at a Kapenguria prison were famously known as the Kapenguria Six (Jomo Kenyatta, Achien'g Oneko, Kung'u Karumba, Fred Kubai, Bildad Kaggia and Paul Ngei), whom the Jubilee Alliance likened to "the Ocampo Six." As Ngugi (2011, 1) persuasively argued, the 'Ocampo Six' "purported an equivalence between their circumstances and those of Kenyatta and his colleagues at Kapenguria."

To illustrate, in one of the Jubilee Alliance's well attended political rallies in 2011, speakers invoked Jomo Kenyatta's (the founding father of the nation) spirit, together with those of other national heroes (Ngirachu and Musembi 2011, 1). At the rally, Mrs Kenyatta (Jomo Kenyatta's widow and Uhuru Kenyatta's mother), vowed that Kenya would never succumb to colonial domination and stated that the 'Ocampo Six' would collapse (ibid, 1). The former first lady also conducted prayers for her son and Ruto, and laid her hands on them, as her husband's speech was broadcast to the crowd (ibid, 1).

Persuasively for the majority of the Kikuyu, the neo-colonial narrative was a reminder of the independence struggle that the *Mau Mau* freedom fighters staged under Jomo Kenyatta to fight British rule. Besides gross human rights violations under colonialism, Kikuyu fertile highlands were expropriated for white settlement and indigenous Africans were relocated to unproductive reserve lands. Hence, the neo-colonial narrative called upon the Kikuyu to resist the reincarnation of colonialism through the ICC – a *mzungu* Court – which was targeting Kenyatta’s son in a new affront on Kenya’s sovereignty. A Kiambu resident observed that according to the people’s narratives, the ICC’s intervention reminisced Western rule that was to be collectively fought in the same way the *mzungu* was battled many years ago (Interview, Kiambu, Kenya, 30 November 2015).

Similarly, the majority of the Kalenjin were in part persuaded by the linking of Ruto’s ICC tribulations to those of the famous leader of the Nandi rebellion – Koitalel arap Samoei, whom some even suggested hailed from Ruto’s Talai clan (Interview, Kalenjin peace activist, Nakuru, Kenya, 22 February 2016). In this light, the anti-ICC rhetoric was a manifestation of Kalenjin history, with Ruto’s struggles reminiscing that of Koitalel (Maupeu 2014, 30).

To date, Koitalel remains very popular amongst the contemporary Kalenjin, who constantly refer to his heroic acts and resistance to British colonialism (ibid, 30). While the state has since emphasized Koitalel’s role in Kenya’s anti-colonial struggle by constructing a national mausoleum on the site of his incarceration, a popular Kalenjin radio station, Kass FM, has produced many stories about him (ibid). For his part, Ruto benefitted from this legacy, given that his father was Daniel Cheruiyot Samoei, and

Ruto is known as William Samoei Ruto (ibid, 30). Therefore, for the ICC's trial of Ruto, the majority of Kalenjin "thought that the ICC is an extension of colonialism ... and was manipulated by outside powers and interested partners in Kenya" (Interview, Kalenjin youth, Nairobi, Kenya, 22 September 2015).

Essentially, the Jubilee Alliance linked the ICC's intervention to the re-emergence of Western domination of Africans (through targeting their leaders while ignoring other serious conflicts), and therefore a need for Kenyans to safeguard their sovereignty. In this regard, statements by Western envoys were reframed as undue external interference in domestic affairs, and, by default, support of their main rival – Odinga.

Specifically, the statement from the USA Assistant Secretary of State that "choices have consequences" was problematic, given that the country is not a party to the Rome Statute, commits atrocities globally and was demanding Kenyans' fidelity to the ICC. A CORD official noted that "the statement showed that unlike Jubilee, CORD had the goodwill of the international community and that progressive Kenyans would believe this to attract international investments and improve international relations" (Interview, Nairobi, Kenya, 28 September 2015). However, he also observed how the Jubilee Alliance, "used the statement to entrench propaganda that Raila, CORD and the West wanted to take Ruto and Uhuru to the ICC" (ibid).

As a result, the neo-colonial narrative resonated with the majority of the Jubilee Alliance's domestic constituencies. Reflecting on the narrative's effects on public perceptions, a Kalenjin youth remarked how, given Kenyatta's and Ruto's persuasion, they easily understood that the ICC was not here for a good assignment, but to subject them to present-day colonization through a judicial process (Interview, Nairobi, Kenya,

2 October 2015). Thus, the youth observed, many people reacted by making them president and deputy president.

In turn, a journalist who followed the ICC's discourses in Kenya posed: "The question this begs is, where does politics end and where does judicial process begin in this case?" (Interview, Nairobi, Kenya, 29 September 2015). Likewise, a prominent human rights activist observed that the "Jubilee Alliance's neo-colonial narrative made it difficult for the Court to project itself as balanced" (Interview, Nairobi, Kenya, 7 October 2015). According to the activist, the framing of the 2013 election as a referendum on the ICC (Warah, 2014) helped to mobilize the Alliance's support base (*ibid*).

Besides, in February 2013, just before the elections, the KNDR monitoring report concluded that debates on the ICC were ethnicized and politicized, and the Court's image was subsumed by political accusations and impunity (South Consulting 2013, vii). However, national support for the ICC remained high (at 66 percent) but low in the home regions of the accused (*ibid*). In part, this reveals that voters in other regions were not persuaded by the Jubilee Alliance's neo-colonial claims. Nonetheless, Kenyatta spoke of his election victory as a triumph of Kenyans against neo-colonial intentions (PSCU 2013, 2).

#### **4.3.2. Gaining concessions from the ICC's sympathizers**

With support for the ICC being construed as pro-neo-colonialism, some of the Court's most audible proponents, mostly Western diplomats, CORD and governance and human rights activists, embraced a more cautious approach in public discourses on the Court. In turn, their retreat provided opportunities for the Jubilee Alliance's neo-colonial narrative to flourish in sub-national and national spaces.

After the backlash against their statements, Western diplomats refrained from making bold pronouncements in support of the ICC trials. The head of a Nairobi-based international NGO noted that the “choices have consequences” mantra was one of the worst things for the Western world to do, and partly explained their retreat (Interview, Nairobi, Kenya, 16 October 2015). She also revealed her subsequent cautious approach for ICJ, thus: “If I am pro-ICC in the field, I can be seen as pro-West ... I am careful not to be seen as a puppet of the West” (Ibid).

Likewise, in the run-up to the 2013 elections, CORD developed a more careful approach to the ICC “because of the surge in portraying the coalition as pushing for ICC prosecutions” (Interview, CORD official, Nairobi, Kenya, 1 October 2015). A former Odinga ally and party official remarked that “the ICC became Odinga’s Waterloo in the Rift Valley ... Ruto had managed to mobilize the Kalenjin around the ICC and this occasioned his (Odinga’s) change of tune” (Interview, former ODM official, Kisumu, Kenya, 11 November 2015). For example, during a campaign rally in Eldoret, Odinga promised to bring the Kenyan cases back home (Interview, CORD official, Nairobi, Kenya, 1 October 2015). Though a pragmatic political statement, it reinforced the Jubilee Alliance’s views that the ICC trials were unwarranted and unnecessary disruptions in Kenya’s domestic affairs.

In addition, during successive Ruto’s fixing debate that the Jubilee Alliance orchestrated to claim that the cases were based on a witch hunt and ought to be halted, CORD took a more pragmatic approach and also supported case termination (Citizen, 2015). Some CORD MPs signed the Jubilee Alliance’s petitions to terminate the cases

(Muthoni and Makena, 2015), whereas, Odinga offered to testify in Ruto's favour at the ICC (Chanji and Oudia, 2015).

Despite their branding as 'evil' society and puppets of the West, governance and human rights activists continued with their national and international advocacy in support of the ICC. However, as Hansen and Sriram (2015) reveal, their labelling as agents of imperialism undermined their pro-accountability message. Many of them found themselves on the defensive and had difficulty in countering the neo-colonial narrative (ibid).

More so, with the Jubilee Alliance in power, the activists no longer felt they could push as actively for accountability, and especially for the ICC (ibid). On several occasions, the Jubilee administration targeted prominent governance and human rights activists with threats of physical harm and intimidation. For example, at the side-line of a 2016 ASP meeting in The Hague, a top government official threatened Gladwell Otieno of KPTJ, cautioning her "to prepare for the consequences of the route she chose" (Allison, 2016). The Jubilee Alliance also proposed amendments to the Public Benefits Organization (PBO) Act, which sought to cap funding to CSOs (FIDH and KHRC, 2013).

Though unsurprising, Western countries reneged on their "choices have consequences" crusade after the Jubilee Alliance's election victory. This followed a pattern of the West's reluctance to enforce stated positions, undervaluing their influence in local spaces, and prioritization of stability that alienate concerns for democracy and justice (Brown and Raddatz 2013, 44). For some Western countries, economic and security

interests overrode the concerns for justice, hence their decisions to restore relations with Kenya (ibid).

The USA, Germany, Italy, France and the UK embarked on business as usual and embraced the Kenyatta administration (ibid, 52). While the UN and the EU suspended or redefined “essential contact,” the UK invited Kenyatta to London for a summit, and the American president reached out to Kenyatta and reaffirmed their relations with Kenya (ibid, 55).

Seemingly, Kenyatta and Ruto’s neo-colonial narrative was instrumental in navigating Kenya’s political terrain, their quests for legitimacy, and battles with the ICC. Their election victory, together with the West’s strategic interests in Kenya, accelerated their admission to the club of global leaders, despite the West’s initial reservations on their ICC cases.

#### **4.4. Conclusion**

The configuration of domestic spaces as contested sovereignties subjected the ICC’s interventions in Uganda and Kenya to domestic normative contestations. In this vein, competing conflict narratives amongst antagonistic groups and the availability of diverse actors and institutions led to critical questions on the ICC’s discretions on alleged suspects, as well as differences of opinion on the Court’s suitability. Nevertheless, and as similar to the outcomes of the transactional and adversarial exchanges, the narratives on the ICC’s interventions unlocked domestic normative contestations over ICJ in both situations.



In the Ugandan situation, the selective referral unsettled the relative power equilibrium which existed between the antagonistic parties to the northern conflict. In a similar vein, the Jubilee Alliance's neo-colonial narrative alienated the ICC and its supporters from the Alliance's support base, which consolidated their legitimacy and quest for political power.

The precedents of the narratives' roles in undermining the ICC's ability to delegitimize some powerful political actors raises several questions. Of great importance is their potential impacts on domestic efforts at cultivating long-term peace in transitioning from conflict. The next chapter demonstrates why the narratives on the ICC's interventions were antithetical to TJ discourses in Uganda and Kenya, and by extension, in other regional contexts, namely the DRC, Côte d'Ivoire, South Sudan and Burundi.

## Chapter 5

### **Narratives on the International Criminal Court's interventions as antithetical to transitional justice discourses**

Beyond their obfuscation of domestic imports of ICJ, the narratives on the ICC's interventions portended as antithetical to TJ discourses in Uganda and Kenya. In so doing, they reproduced and reinforced the same (divisive) societal binaries that contributed to Uganda's northern conflict and Kenya's 2007/2008 PEV. In turn, the binaries undermined some of the gains made by TJ discourses and compounded their limitations. The end result was a resurgence of Uganda's pervasive north-south divide and the mutation of Kenya's ethno-regional formations.

By discussing the narratives on the ICC's interventions as antithetical to TJ discourses, this chapter further attests to their prominence, in addition to providing insights on their far-reaching impacts in local and regional realms.

More specifically, in Uganda, narratives of the ICC's selectivity replicated and reinforced dichotomies of 'just' (GoU) versus 'unjust' actors (LRA) in the northern conflict. The ensuing dichotomies aggravated some of the limitations of Uganda's TJ mechanisms, whose institutional designs also followed the 'just/unjust' actor binaries. In the long-run, perceptions of the Court's contribution to perpetual injustices in northern Uganda undermined prospects for bridging the north-south divide, and limited opportunities for comprehensive truth-telling.

Similarly, in Kenya, the Jubilee Alliance's neo-colonial narrative revived and sustained colonial era binaries as markers of identity amongst ethnic communities. By allotting

nationalism to the ICC's opposition and vice versa, the narrative reinvigorated ethno-regional divisions and emerged as a misnomer for Kenya's TJ trajectory.

Besides their domestic impacts on TJ and long-term peace-building, the narratives had far-reaching implications for other conflict scenarios in the African region. First, Uganda's selectivity deciphered the ICC's impartiality, after which other regional players invited the Court to investigate their domestic military/political opponents. The ensuing cases in such situations (the DRC and Côte d'Ivoire) had similar implications on domestic efforts towards peace-building. Second, Kenya's neo-colonial narrative gave new relevance to African protectionism; thus, a shield to potential ICC situations, such as South Sudan and Burundi.

The next section provides an overview of evident societal binaries that the narratives on the ICC's interventions reproduced and reinforced in Uganda and Kenya. The section is followed by discussions of the GoU's selective referral of the LRA to the ICC and its contributions to perpetual injustices in northern Uganda. The chapter then turns to explanations of the Jubilee Alliance's neo-colonial narrative and its departure from the aspirations of Kenya's TJ processes. The chapter then assesses regional level effects of the Ugandan and Kenyan precedents, such as on ICC situations (the DRC and Côte d'Ivoire), and other potential situations, namely South Sudan and Burundi. The chapter concludes by briefly revisiting some of the main arguments, and subsequently links to discussions of Uganda's and Kenya's complementarity dilemmas in their transitions from conflict to peace.

### **5.1. The International Criminal Court's interventions and reinforcement of divisive binaries**

The ICC's entry into Uganda's and Kenya's domestic realms was preceded by deep ethno-regional divisions, that formed the cleavages under which their conflicts erupted and resulting apportion of blame. Additionally, the emergence of narratives revived the same societal divisions, thus intensifying the countries' retrogression in transition from conflict to more sustainable peace.

During the northern conflict, the north-south dichotomy was so eminent that it attracted sentiments of a neglected north (UN, 2004c; Kaaya, 2014; Hitchen, 2017). As a Ugandan government official recalled, for close to two decades, the north was a no-go zone, was marginalized, had limited services and was less attractive (Interview, Kampala, Uganda, 4 February 2016). The region was also characterized by a breakdown in the rule of law and many people lived on donations because the land could not be utilized for fear of attacks (ibid).

Comparatively, the south was more prosperous and people experienced fairly better living conditions, as it was less affected by war after the NRM's rise to power in 1986. Hence, in the south, there were pronouncements of the north as "another country" (Interview, professor, Kampala, Uganda, 13 January 2016). The majority of the people in the south were also indifferent to the conflict because it affected "those people in the north" (ibid).

In Kenya, the 2007/2008 political crisis renewed societal mistrust along the PNU-ODM party axis under which most people voted and the violence occurred. These dichotomies mutated into the Jubilee-CORD division during, and after the 2013

elections. As already discussed in Chapter 2, the ethno-regional divisions were so deep, such that there were remote considerations for the country's sub-division along the voting blocks. In the aftermath of the 2007/2008 PEV, intra-national relations bifurcated a second-tier identity of being either pro-ODM or pro-PNU, to the detriment of a national identity. More worryingly, the divisions included group references of the significant 'other' as the enemy.

In a similar vein, Kenya's post 2013 ethno-regional realignments were triggered by the ICC's December 2010 naming of suspects. After Kenyatta's and Ruto's inclusion in the ICC's charge sheet, the majority from their respective Kikuyu and Kalenjin communities joined them in rejecting the Court. Conversely, the majority of Luo, Luhya, Kisii and other coastal communities, whose leaders were not indicted, supported the ICC. As a result, Kenyatta and Ruto's anti-ICC stances under the neo-colonial narrative further widened the ethnic divisions that predispose the country to perennial political violence.

In sum, Uganda's and Kenya's narratives on the ICC's interventions provided impetus for the continuation of the countries' societal divisions. By propagating the GoU's dichotomies of 'just/unjust' actors to the conflict, narratives of the ICC's selectivity reinforced a sense of 'being northern,' or the region and its people as targets of marginalization, both at home and abroad. Likewise, Kenya's neo-colonial narrative brought to the fore, and ringfenced the salience of ethnicity as a marker of identity and a sense of division in equal measure.

The arguments that the GoU's selective referral of the LRA to the ICC reproduced the 'just/unjust' actor dichotomy is not a novel finding in this thesis, as similar arguments

have been made elsewhere. For instance, Nouwen and Werner (2010, 960) posited that the referral denoted a friend-enemy dichotomy with the international community, to the extent that the two parties were never to be treated under equal terms or as same warmongers. Branch (2016, 1) has also argued that the trials produced conflict narratives of ‘an evil’ LRA and ‘a good’ GoU.

Building on the aforementioned arguments, this thesis goes further to assess the binary differentiations that the ICC’s intervention accentuated, and their implications for TJ discourses, which the scholars paid little attention to. For the purposes of these discussions, the ICC’s processes, together with TJ discourses, are conceptualized as performances of the narrative content of the past. This suggests that the performances reconstruct some of the past events, and imbue them with elements of truth-telling, fresh memories and legitimacy. Therefore, the simultaneous discussion of the performance of Uganda’s past in the ICC’s processes and TJ mechanisms shows that the country’s circumstances are not unique as similar occurrences can unfold elsewhere.

Although the ICC’s fact-finding mission is contested (for example Stahn, 2012), there are also arguments that international tribunals “interact with agents of memory” besides their substantial leverages in this domain (Hirsch 2017, 1). In this context, Koskeniemi (2012, 3) elaborates that the significance of international criminal trials lies elsewhere than in retribution – “establishing the truth of events.” Indeed, during the opening of Ong’wen’s prosecution, the OTP argued that the trial would certainly illuminate on the northern Ugandan situation and contribute to truth-telling regarding the crimes prosecuted (ICC 2016a, 1).

## **5.2. The International Criminal Court's selectivity in Uganda: perpetual injustices in the north?**

To a significant number of northern Uganda's population, the ICC's selective processes denoted the propagation of enduring injustices with regards to the northern conflict. These perceptions were particularly important, given that the region was neglected by the state, and suffered the most severe consequences of the conflict.

In this sense, the Court's focus on the LRA, and inattention to alleged GoU's atrocities legitimized existing and dominant binaries; of the latter as 'just' and the former as 'unjust' actors to the northern conflict. Promoted by the GoU for the most part of the conflicts' timeline, the binaries emerged as critical reference points amongst many local and international observers.

The 'just' versus 'unjust' actors' dichotomy included a government official's articulation of how, Museveni is honoured at home, and internationally, for liberating Uganda (Mayega 2016, 1). Moreover, according to the official, Museveni was credited for eliminating barbaric sectarianism and political indiscipline of the 1960s and 1980s (ibid,1). Moreover, in the words of the GoU's spokesman, Ofwono Opondo, the "NRM has led the country on an uphill journey from the unflattering reputation as the 'sick nation of Africa,' to a nation of hope and opportunities" (cited in Kidimu 2015, 22). For Opondo, this success is attributed to the regime's leaderships' twin historical duties of liberation and transformation.

On the contrary, in the NRM's lexicon, the LRA labels alternated between bandits, criminals and terrorists, depending on prevailing circumstances. This followed a similar pattern of belittling opponents in degrading tags (such as the Rwandan

*Genocidaire*), in order to promote their hate and isolation (Interview, researcher, Kampala, Uganda, 27 January, 2016). The de-humanizing strategy is “a standard way to make people think badly of who you want to crush” (ibid). The demeaning tags were oblivious of the LRA’s rationalization of the war based on: perceived provocation by the NRA/M, marginalization of the north, and intentions to establish a theocracy and purify Uganda.

During the northern conflict, Museveni was at the forefront of degrading the LRA with the various labels that subsequently informed the regime’s action points. For instance, he described the insurgents as “a purely tribal opportunist group” or “the Kony bandits that are all in one way or another linked to the old Obote regime” (Museveni 1997, 215). Museveni further argued that the northern problem was over-emphasized, and that he could not negotiate with the bandits on insecurity, due to their criminal nature, as opposed to their armed opposition to the government (ibid, 297).

Departing from the criminal tag, Museveni conflated the LRA’s insurgency with terrorism after the September 11, 2001 terrorist attacks in the USA. Building on Mao Tse Tsung’s definition of just wars that involve popular participation, Museveni (2001,6) distinguished Africa’s revolutionary wars from terrorism. According to him, fighting a just war with terrorism is a misstep (ibid, 6). This is because terrorism; can target those who are not opposed to revolutions, and attacking civilians delegitimize revolutionaries and limits their support base (ibid, 6). Turning to Uganda, Museveni claimed that the country had been battling terrorists (for more than a decade), who could be defeated by enough spending on defence (ibid, 7). In turn, Kony admitted that



he had lost in the “war of propaganda that Museveni waged against him” (Cakaj 2016, 92).

In furtherance of the ‘just/unjust’ actor dichotomy, some of the NRM’s original founders or ‘historicals’ demarcated the regime’s intentions from the. For example, a former NRM’s political commissar, Eriya Kategaya, proclaimed that the northern populations realized that the LRA, who posed as their sons, inflicted more harm against them than the NRA ‘foreigners’ (Kategaya 1993, 26).

Similarly, another ‘historical,’ Amama Mbabazi singled out the LRA for genocidal intentions in the north. Mbabazi (2014, 18) argued that people ran to the UPDF during instances of insecurity as evidence of the regime’s intents to “protect and not destroy them” (ibid, 18). His claims were reinforced by the ongoing ICC investigations, which he posited were testimony to the LRA’s genocidal intents, while the government’s side was cooperating with the cases (ibid).

The ICC’s subsequent focus on the LRA, and not any of the alleged regime atrocities affirmed the dominant dichotomies of ‘just’ versus ‘unjust’ actors in the northern conflict. Moreover, the Court’s labels of war crimes and crimes against humanity in the LRA’s charge sheets corresponded with the GoU’s labels of bandits, criminals and terrorists.

In summary, the referral concurred with the GoU’s narrative of having contributed to peace in the country after years of turmoil, hence their ‘just’ actor categorization. Overall, the ICC’s intervention was part of the GoU’s broader conflict management platform that comprised: military campaigns, peace talks, and possibly, ICJ in annihilating the obstinate LRA.

### **5.2.1. The International Criminal Court's processes and transitional justice as performances of the past**

As a result of Uganda's ICC's processes and TJ institutional designs following the 'just/unjust' actor dichotomy, the country's transition trajectory (on the northern conflict) only reconstructed alleged LRA atrocities. In other words, official accounts of the northern conflict were mostly attributed to only the LRA's crimes, and not the conflict in totality.

Given that the ICC's, amnesty's and traditional justice's performances coalesce as a 'chain of complementarity,' the exclusive focus on the LRA constrained efforts at providing a holistic account of the past and fostering truth-telling (Interview, human rights activist, Gulu, Uganda, 30 March 2016). This was so because the various components of the 'chain of complementarity' have different principles, serve different purposes, and complement each other (ibid).

With regards to traditional justice, an Acholi elder recounted how the processes are holistic, pro-life and bridge the gulf between the victim and perpetrator communities (Interview, Gulu, Uganda, 25 March 2016). As he further revealed, the commission of atrocities is followed by personal identification, and then cleansing and acceptance rituals known as *Nyono Ton'g Gweno*. The next step is truth-telling, whereby the perpetrator reveals the identity of his/her victims, the motives for killing, and the exact location of the atrocities (ibid).

Afterwards, efforts are made to reach out to the bereaved parties via a neutral arbiter, and the perpetrator's community acknowledges wrongdoing (ibid). If the victim's group are satisfied with the explanations, they mourn their dead for six to twelve

months, which is then followed by compensation from the perpetrator's community (ibid).

The two parties then seek reconciliation, which culminates in either *Gomo Ton'g* (performed by the Acholi and other ethnic groups) or *Mato Oput* (between Acholi clans) (ibid). For *Gomo Ton'g*, a spear is bent by the perpetrator's and the victim's communities, signifying that they will "no longer use spears against each other" (ibid).

*Mato Oput* entails drinking of the bitterness of the violence after accepting responsibility (ibid). It involves symbolically drinking the bitter herbs of *Oput* tree, which is a family tree – it grows together (ibid). During the rituals, two *Oput* trees that share the same root are cut in the middle, and mixed with local brew, *Kon'go*. (ibid). The concoction is put in a calabash, placed in the middle and shared by three or four representatives from each group (ibid).

While kneeling, the representatives form pairs on each side and hold hands at their back, as a sign of complete disarmament. In so doing, they are witnessed by the living, the living dead (ancestors), the unborn children and God (ibid). The whole process is called "confrontation with your enemies" (ibid). More importantly, the representatives make covenants to the effect that they will never do harm to each other (ibid).

At the height of the northern conflict, many LRA returnees underwent the elaborate rituals in ceremonies that were supported by NGOs, churches, Acholi in the diaspora, government officials, amnesty commissioners and senior army commanders (Afako, 2002). However, some LRA soldiers opted out of the largely voluntary processes, whereas some of them reported to government reception centres which lacked traditional justice procedures (Interview, Acholi elder, Gulu, Uganda, 25 March 2016).

Yet still, the rituals that some of the LRA rebels undertook revealed instances of atrocities – their nature, identity of some victims and motives. On the other hand, confining such rituals to only the LRA's side of the conflict perpetuated their connotations with injustices, and not their antagonistic partners.

Acholi traditional justice was intrinsically connected with the amnesty processes as an alternative to formal justice. Through the Amnesty Act of 2000, the country expressed its desire to end armed rebellion, foster reconciliation with alleged perpetrators and reconstruct communities. The Amnesty Act advocated for “pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State” (Amnesty Act, 2000). However, amnesty was conditional on an individual's renunciation of armed resistance, after which a certificate was issued (*ibid*).

For enforcement purposes, an Amnesty Commission was established for an initial period of six months. The Act and the commission were later on extended for an indefinite period, due to their relative success in encouraging many combatants' defection. As of 2013, approximately 13,022 LRA soldiers were granted amnesty and reintegrated into society (Amnesty Commission 2013, 20). By accepting amnesty, the LRA's rank and file were acknowledging wrongdoing on their part, which was an extension of truth-telling.

Similarly, the ICC's processes followed the trajectory of local responses to the LRA's atrocities, which placed limitations on counter-factual narrations of the northern conflict. From the initiation of investigations, collection of evidence and documentation of victims, the ICC legitimized official accounts of the northern conflict on the GoU's single focus. The climax of these legitimations was in Court proceedings,

as exhibited by the altercations between the OTP and defence lawyers that provided some insights into the conflict. The exchanges also brought to the fore some events which were clouded in contested conflict narratives, albeit under restrictions of the LRA's culpability.

On collection of evidence and witness testimonies, the vast majority of victims' submissions were confined to specific cases for which they were applying to be enjoined (Cody et.al 2015). It therefore followed that many victims' accounts were limited to specific case incidences of the LRA atrocities that were under the ICC's focus. For example, one victim recalled ordeals of the LRA's beatings, torture, and memories of the insurgents' killings and burning of people's houses (Cody et al. 2015, 33). According to another victim, participation in the ICC's processes would contribute to evidence on the atrocities Kony meted on communities, as well as amplify the victims' voices (ibid, 33)

As further illustrated during the opening of Ong'wen's trial in December 2016, the OTP revisited four specific LRA attacks in Pajule, Odek, Lukodi and Abok, that occurred between October 2003 and June 2004 (ICC 2016b,1). Besides, the OTP revealed that nearly 4,000 people had requested to be enjoined as victims of these attacks (ibid). The OTP also recalled that during the attacks; several residents were murdered, homes were burnt, and some survivors were enslaved by the LRA as potters for domestic animals, food, clothes, money and other basic necessities (ibid). Moreover, the LRA captured children for longer periods and used them as soldiers and sex slaves (ibid, 1).

In subsequent court proceedings, the witness list also consisted of some former LRA soldiers and government officials, who also provided incidents of the rebels' atrocities. Taken together, their testimonies had overbearing implications for the LRA's claims to non-liability, in addition to overriding alleged government's culpability in the northern conflict.

In one of the proceedings, a Ugandan top military lawyer, Timothy Kanyonganya, revealed that the country's intelligence agencies gave the ICC evidence against Ong'wen and 15 other LRA commanders (Maliti, 2017a). Kanyonganya also disclosed that Uganda had a joint intelligence committee that investigated the northern conflict, and collected evidence was passed on to the ICC (ibid). In another court proceeding, a former LRA intelligence officer recalled how, the LRA used three different groups to attack Pajule in October 2003, with Ong'wen leading abductions and looting at the trading center, as Raska Lukwiya led the three groups (Maliti 2017b, 1)

Evidently, narrations of the northern conflict in the ICC's investigation and prosecution of the LRA, and the insurgents' involvements in traditional justice and amnesty were critical steps in Uganda's transition. However, similar opportunities were missed with other parties to the conflict – the GoU – who did not undergo comparable, if not, the same processes.

Consequently, Uganda's performances of the past were revealing of their danger – constant narrations of one dominant narrative of an 'unjust' LRA, as the other (the GoU's injustices) diminished. This begs the questions, how did the ICC's involvement in Uganda contribute to national healing and reconciliation, that some commentators list amongst the prospects for ICJ?

With nearly all performances pointing to the LRA's atrocities, it is increasingly becoming difficult to point empirical evidence to the GoU's alleged atrocities. This limits opportunities for the latter's redress and comprehensive truth-telling. In the absence of a truth-telling process for the northern conflict, the ICC's and domestic performances of the past constrain efforts at reconciling the north with the rest of the country.

Against the backdrop of the selective performances, several people in the north continued to narrate their experiences in the conflict, which included incidences of regime atrocities. As a Gulu elected representative summarized, "there is dismay among people in the north about the failure by the ICC to demonstrate fairness in investigating both sides" (Interview, Gulu, Uganda, 23 March 2016). According to an influential Acholi religious leader, the ICC's intervention is incomplete, only targets one side, and the selective prosecution is indicative of shielding one party to the conflict (Interview, Gulu, Uganda, 30 March 2016). For a Gulu based human rights activist, "the government committed atrocities post 2002, such as the Mucwini massacre (Interview, Gulu, Uganda, 30 March 2016).

Dissenting sentiments on the official narrations of the conflict reveal the apparent lack of closure on perceived regime atrocities, of which the GoU intends to downplay as much as they can. Yet still, the selective prosecutions of the LRA contributes to the creation of large amounts of silence, from which real impunity originates and helps victors to write history (Interview, researcher, Kampala, Uganda, 3 February 2016). The Ugandan precedents generally fit in the ICC's accusations of producing moral

narratives of African conflicts, and then imposing them by siding with states that intend to use them in justifying their authorities (Branch 2017, 7).

Perceptions of the ICC's contribution to perpetual injustice in the north further distanced the region from the rest of Uganda, and the central government in Kampala. As an Acholi religious leader observed, the north-south divide is still evident, and is a very serious issue (Interview, Gulu, Uganda, 25 March 2016). For an Acholi native based in Kampala, "there is still a sense of indifference between the north and the south" (Interview, Kampala, Uganda, 28 January 2016). There are also sentiments of the south's domination of the government and the army – a system in which the north feels alienated (ibid).

In recent elections, the north votes overwhelmingly for the opposition, although the regime has made considerable gains in recent elections. However, some commentators attribute the upsurge in the regime's support in the north to electoral malpractices, including vote buying, rigging, and over spending in an otherwise poor region (Kasasira, 2011). Apparently, Museveni's conflation of voting with development, and more realistic beliefs in his longevity in power breeds resentment, and pockets of approval in equal measure.

Departing from the Ugandan precedent of contributing to perpetual injustice in the north, the ICC's intervention in Kenya's political crisis was conflated with neo-colonialism by the Jubilee Alliance. Subsequently, the narrative reinforced ethno-regional divisions and subsequent disruptions of the country's TJ discourses.



### **5.3. The neo-colonial narrative as a disjuncture for transitional justice discourses in Kenya.**

Consequent to the Jubilee Alliance's success with the neo-colonial narrative in battling the ICC, Kenya's trajectory was set on a collision path with the normative aspirations of TJ discourses. This obtained from the narrative's entrenchment of ethno-regional divisions and exacerbation of politicization of ethnicity, which is one of the root causes of election-related violence in the country.

As a crucible for propagating negative ethnicity, the neo-colonial narrative undermined the contributions of TJ mechanism that strived towards building a more cohesive society. These included the NCIC's endeavours of promoting unity, and the TJRC's calls for "concerted efforts to foster reconciliation and sustained community dialogues" (Republic of Kenya 2013, 62). Besides, the narrative's promotion of negative peace between the antagonistic Kikuyu and Kalenjin communities closed avenues for addressing long-standing issues that prompted their violent confrontations in the 2007/2008 PEV.

Due to the narrative's reminiscence of Kenya's past under British colonialism, binaries of 'collaborators/traitors' versus 'resistors/nationalists' were brought to the fore in public discourses after the ICC's intervention. During colonial times, nationalists were individuals and groups who resisted British rule, such as the Kapenguria Six, trade unionists and freedom movements. Notably, the last group consisted of the Mau Mau, the Nandi rebellion, and other organized groups whose resistance accelerated Kenya's fight for independence. Conversely, 'traitors/collaborators' were individuals and communities who cooperated with British colonialism, such as: Kikuyu home guards

(anti Mau Mau groups), and traditional leaders, including Nabongo Mumia of Wanga and Lenana of the Maasai.

Therefore, the Jubilee Alliance's translation of the ICC's intervention as neo-colonial encouraged hints of whom/which ethnic groups were either 'collaborators/traitors' or 'resistors/nationalists. Many interviewees talked of the former as individuals and communities who were perceived as the ICC's proponents, and the latter as the Court's opponents. Such interpretations were specific to the majority of the Kikuyu and Kalenjin, who were convinced that the Court's intervention was a reincarnation of colonialism.

Simply put, the majority of the Kikuyu and Kalenjin who shared the Jubilee Alliance's neo-colonial re-interpretations considered themselves as nationalists. On the contrary, they perceived other groups, mostly CORD supporters from Luo, Luhya, Kisii and coastal communities, including their own, and civil society activists, who were not strongly opposed to the ICC or pronouncedly supported the Court, as 'collaborators/traitors.' According to the 'nationalists' logic, opposition to the ICC was protective of withering Kenya's sovereignty, whereas support constituted the promotion of Western imperialism.

Furthermore, in the veneer of the binary differentiations were deep ethno-regional sentiments. As such, a peace activist revealed that amongst the majority of the Kalenjin, whoever supported the ICC was seen as an enemy of the community and its rejection was a point of convergence (Interview, Nakuru, Kenya, 11 November 2015). Likewise, a Kalenjin youth noted that Odinga's support for the ICC, including their co-ethnics, portrayed them as traitors, pro-West, opponents and troublemakers (Interview, Nairobi,

Kenya, 2 October 2015). For his part, a Kikuyu politician wondered how some Kenyans could want one of their own to be convicted, suggesting that the ICC's supporters were enemies of the Kikuyu nation (Interview, Nairobi, Kenya, 23 September 2015).

In short, the neo-colonial interpretations were underpinned by a philosophy of we-ness, and concomitant disdain on 'them' who are against 'us.' As one Rift Valley peace activist argued, "in Kenya, the ICC divides and connects people" (Interview, Nakuru, Kenya, 2 November 2015). In other words, the neo-colonial narrative flourished because of, and continued entrenching, the pervasive deep ethnic cleavages in the Kenyan society which domestic TJ discourses, though inadequate, attempted to respond to.

Nonetheless, the newfound Kikuyu/Kalenjin alliance was testament to negative peace, temporary ceasefire or superficial reconciliation. A Kikuyu youth narrated how their relationship with the Kalenjin was a truce and that of convenience, since the pain in their hearts would never let them forgive (Interview, Kiambu, Kenya, 30 November 2015). In a similar vein, a Kalenjin politician posited that the reconciliation with the Kikuyu lasted as long as it was convenient, and that none of the issues which led them to the violence had been addressed (Interview, Nairobi, Kenya, 12 April 2016). As a peace activist noted, the Jubilee Alliance was not a reconciliation between communities, but an ethnic alliance that was glued by concerns on the ICC's prosecution of leaders (Interview, Nairobi, Kenya, 27 October 2015).

From the foregoing revelations of apparent non-closure amongst many Kikuyu and Kalenjin, it follows that the neo-colonial interpretations obfuscated the narratives of differences amongst them. For the purposes of fighting the ICC, the Jubilee Alliance

needed to construe the 2007/2008 PEV as spontaneous, and that peace had returned to Kenya. Though conveniently deployed to delegitimize the ICC and mobilize voters, these manoeuvres made it more difficult to address the divide between the two communities.

To date, many Kikuyu who were evicted from the Rift Valley have not returned to their former homes or farms, despite their purported reconciliation with the Kalenjin. A Kikuyu peace activist based in the Rift Valley observed that many could not go back to their original land despite the government's resettlement programmes, because of mistrust and fear (Interview, Nakuru, Kenya, 23 February 2016). According to the peace activist, some people say that: "I know my neighbour who killed my brother, how can I trust that he will not come down and kill me?" (ibid). In this regard, Daley (2013, 895) rightly argued that aggressions towards perceived 'outsiders' continuously produces group identities under conditions of "exclusionary practices," due to the forms of their previous dislocation.

Moreover, after Kenyatta's charges were withdrawn in March 2015, and Ruto's and Sang's cases were ongoing, tensions escalated in the Rift Valley.<sup>22</sup> There were fears of new waves of violence and retaliation against the Kikuyu, stemming from perceptions that Kenyatta had abandoned Ruto at the ICC. Indeed, a senior Kalenjin politician decried how the Kikuyu relaxed after Kenyatta's case was offloaded, while the

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<sup>22</sup> Many peace activists advanced this proposition, as well as some Kikuyu and Kalenjin interviewees.

Kalenjins still felt pressurized by Ruto's trials (Interview, Kalenjin youth, Nairobi, Kenya, 2 October 2015).

More worryingly, the possibilities of Ruto's conviction increased the risks of violence. For example, a peace activist noted that in the event of Ruto's conviction, locals would mobilize violence and evict the Kikuyu from the Rift Valley (Interview, Nakuru, Kenya, 2 November 2015). A senior official in the Jubilee administration opined that there was uncertainty and caution on how the ICC process would end, which dampened the momentum for reconciliation (Interview, Nairobi, Kenya, 21 November 2015).

As a result, some Kikuyu victims conducted prayers for an end to Sang's and Ruto's cases in April 2016. As one victim said, "we expect the best results ... and if in any way they rule against their favour, we shall be forced to travel to ICC and appeal the decision" (cited in Kibor 2016,1). According to another victim, "they had reconciled and forgiven each other and are now engaging in development activities together" (ibid).

The negative peace between the Kikuyu and Kalenjin is susceptible to an eventual breakdown, due to Kenya's shifting ethnic alliances and political dynamics. Despite the Jubilee Alliance's feats with the anti-ICC logic, the Kikuyu and Kalenjin continue to distrust each other, and the Alliance's longevity is dependent on Kenyatta's and Ruto's healthy relations (Cheeseman et.al. 2014, 16).

Overall, the neo-colonial narrative reinforced the salience of Kenya's ethnic identities and a sense of difference and competition amongst them. This is particularly important, given that, while the Jubilee Alliance has held to date, many people question whether

it will continue after Kenyatta's second term ends, and whether the Kikuyu will back Ruto in the next elections scheduled for 2022.

Beyond the national level impacts on TJ, the ICC's accusations of being selective in Uganda and neo-colonial in Kenya had implications for other regional conflict scenarios. The latter effects partly contributed to the Court's legacy on the African continent.

#### **5.4. 'Inventing' the International Criminal Court's legacy in Africa**

Contrary to aspirations of the drafters of the Rome Statute, the GoU's selective referral and the Jubilee Alliance's neo-colonial narratives invented the ICC's legacies in the African region – demonstration effects and African protectionism. These outcomes undermined the ICC's universality of justice in other conflicts scenarios, notably the DRC, Côte d'Ivoire, South Sudan and Burundi.

Precisely, the GoU's example was followed by domestic authorities in the DRC and Côte d'Ivoire, who similarly invited the ICC to investigate their military/political opponents, with almost the same implications on TJ. On the other hand, the Jubilee Alliance's neo-colonial narrative provided impetus for African protectionism as well as demonstration of the narrative's utility in battling global justice. The beneficiaries of the Kenyan precedents included some of the affected political elites in South Sudan and Burundi.

#### **5.4.1. Demonstration effects of Uganda's selective referral and implications for transitional justice**

Perhaps, the GoU's selective referral deciphered the ICC's normative imperatives such as its blindness to justice, and aspirations of overcoming the Nuremberg legacies of victor's justice. To this effect, a questions and answers section on a UN document indicated how on the occasion of the ICC's establishment, there would be fair and competent judges, as well as protection of individuals from politically induced criminal prosecutions (UN 1998c, 1).

Furthermore, it was clarified that there would be an equal application of criminal liability to all people, regardless of their senior positions in government (*ibid*, 1). This clarification spoke to Article 27 of the Rome Statute that deliberates on "irrelevance of official capacity," or non-exemption of state officials from criminal liability based on their positions.

Similarly, the OTP's policy paper on Case Selection and Prioritization outlined their adherence to impartiality, which obtains from Articles 21(3) and 42(7) of the Rome Statute (ICC 2016c, 8). As further stated, the OTP would be guided by constant standards and methods, notwithstanding the States, parties, groups or individuals involved (*ibid*). Bensouda (2012, 506) reiterated that the ICC owes its legitimacy and standing to its working environment as dictated by the Rome Statute, and the OTP's consistence, clarity, transparency, and predictability in its operations (*ibid*, 506). With regards to institutional legitimation, Bensouda argued that the ICC is in every respect a judicial actor, which enables it to operate in the political international sphere (*ibid*).

However, the GoU's success with the selective referral signalled to other regional players that such a strategy was plausible at the ICC. Equally accused of committing international crimes, the DRC and Côte d'Ivoirean authorities appropriated the Ugandan precedent, thus entangling the ICC in the Nuremberg legacies that it so sought to disengage from. After state invitations, the ICC opened investigations in the DRC in June 2004, and October 2011 in Côte d'Ivoire (ICC, 2017a).

The DRC situation emerged from the country's long history of intractable conflicts that resulted from state failure. Accordingly, the UN Economic Commission for Africa (2015, vii) attributes the DRC's fragility to a combination of factors, namely: a weak economy and macroeconomic conditions, poor governance, and a decline in social spheres. The Congolese conflicts were also induced by legacies of institutions which created and reinforced competitions state power and control of natural resources, differences of opinion on configuration of the state – federalism vs. centralization, and manipulation of citizenship and legislation by politicians (ibid, vii). Taken together, these factors undermined the state's capacity to deliver public goods, thus creating enabling conditions for grievance versus greed motivated struggle for state power (ibid, vii).

Beginning in 1996, the Congolese wars endured up to the 2000s after the ICC's establishment. As a state party to the Rome Statute, the DRC was under obligations to commence domestic trials for the international crimes committed within its borders. Nevertheless, President Joseph Kabila opted to refer his military/political opponents to the ICC in June 2004, despite similarly facing accusations of committing war crimes. Hence, the DRC's case selection was believed to be based on the ICC's intentions of



cultivating cordial relations with government actors, thereby excusing them from prosecutions and enhancing the Court's investigative activities (Clarke 2008).

Since then, the ICC's intervention in the DRC has focused on international crimes that were committed in the east, north and south Kivu, and in the Ituri region (ICC 2017a, 1). The Court's processes have subsequently led to: (1) convictions, in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Germain Katanga*, (2) acquittal of Ngudjolo Chui and (3) ongoing trial of Bosco Ntaganda (ibid).

Similarly, Côte d'Ivoire has endured state fragility that emanates from ethnic fractionalization and geographical inequalities between the north and south. The climax of the country's fragility was the 2010-2011 political crisis that built up from the disputed presidential elections results.

The main protagonists in the elections were Laurent Gbagbo (incumbent) and Alassane Ouattara (his main rival), whose supporters fought along ethnic, religious and regional differentiations. The ensuing violence led to the death of approximately 3, 000 civilians, besides other human rights violations (Human Rights Watch 2011b, 26-90). With the backing of French soldiers, Ouattara declared a military victory in April 2011, and was consequently installed as the country's president (ibid).

As of the time of the political crisis, Côte d'Ivoire was not a state party to the Rome Statute, but had accepted the ICC's jurisdiction in April 2010. The Presidency reconfirmed the acceptance in December 2010 and May 2011 (ICC, 2017a). Thus, the OTP requested Pre-Trial Chamber authorization to commence investigations in the country, which was granted in October 2011 (ICC, 2017a).

Subsequently, the OTP declared its intentions to impartially investigate the situation and prosecute alleged perpetrators of the violence (ICC 2011, 1). However, the prosecution's successive focus on the losing side can be best described as "a tactical rapport with the government" (Rosenberg 2017, 475). In so doing, the OTP employed a pragmatic vision of impartiality rather than a political one; with a view of operating as "an effective prosecutorial body" in its interaction with the regime's tactics in post-crisis legitimation (ibid, 475). The political vision of impartiality dictates neutrality that involves simultaneous investigations and prosecutions of both sides of the political divide (ibid, 474).

As such, the OTP's charge sheet concentrated on the alleged atrocities committed by the pro-Gbagbo camp, namely: Laurent Gbagbo, his wife Simone and Charles Blé Goudé. The three were jointly accused of committing crimes against humanity in Côte d'Ivoire's PEV (ICC 2016d, 1). Whereas Gbagbo and Blé Goudé are in the Court's custody, with ongoing trials, Simone is still at large (ICC, 2015d). Simone was charged in national courts for war crimes, after which she was acquitted in March 2017 (Tawa and Engelsdorfer, 2016).

As in the Ugandan case, the DRC and Côte d'Ivoirean situations faced similar experiences of the ICC's investigation and prosecution of one side to the conflict. Such an approach was expected, due to the nature of the Court's *modus operandi* of relying on state cooperation. Given that both the DRC and Côte d'Ivoire were also characterized by haphazardly implemented TJ frameworks, the ICC's subsequent selective investigative and prosecutorial steps aggravated the limitations of their TJ mechanisms and prospects for long-term peace.

To illustrate, several problems undermine the DRC's redress to its violent past, which also worsened with the ICC's inattention to some of the alleged perpetrators. Although some suspected war criminals were prosecuted in domestic military courts and tribunals, the majority of them remained unpunished (Human Rights Watch 2014, 1). This was because of the reality of corruption, limited capacity and political meddling in the DRC's justice system (ibid, 1).

Additionally, the DRC authorities abandoned efforts to establish a truth commission, which implied a loss in avenues for accountability, truth-telling, promoting reconciliation and conflict mitigation (Tunamsifu, 2015). Moreover, the DRC's vastness and the absence of the state in some parts of its territory endures it to protracted conflicts in the peripheries. These include instances of communal violence in the east in February 2016, and the August 2017 Kasai violence between militias and the government, that both led to civilian deaths and human rights violations (Voice of America, 2016; UN, 2017a).

Likewise, Côte d'Ivoire's post-conflict trajectory was bedevilled with numerous challenges at the domestic level, which the ICC's single focus accentuated. For example, national criminal accountability for alleged perpetrators of the 2010-2011 PEV was directed to losers in the civil strife, as the victors were guaranteed impunity (Kobi, 2016). Even though there were several instances of arbitrary detentions of opposition figures from the Ivorian Popular Front (Front populaire ivoirien, or FPI), the 20 pro-Ouattara soldiers who were equally accused of committing atrocities remained untouched (ibid).

The aforementioned developments negated the National Commission of Inquiry's (CNE) report on the PEV that adduced evidence of both sides' responsibility (Republic of Côte d'Ivoire, 2012). Hence, as Kobi (2016, 1) posited, the country's judicial system constrained efforts at consolidating social cohesion by reinforcing impunity.

Besides, the Commission for Dialogue, Truth and Reconciliation's (CDVR) report on the PEV was not made public by the government (Human Rights Watch 2015, 57). Instead, the Ouattara regime established a national reparation and reconciliation commission, as the CDVR's successor (ibid). Despite its attention to some of the victims' needs, the selective focus on reparations undermined the far-reaching aims of addressing the triggers of the country's political violence (ibid, 58).

With the lack of comprehensive approaches to TJ, Côte d'Ivoire remained a deeply divided society. The ICC's selective trials added to societal divisions by alluding to perpetuation of injustices amongst some sections of the society. In this regard, Kobi (2016,1) rightly argues that the ICC's trial of Gbagbo and Charles Blé Goudé is inadequate in securing justice for victims. As Remi (2015,1) posited, Côte d'Ivoire's reconciliation process is perhaps a 'mission impossible,' due to inattention to divisions, pronounced impunity and injustice, and the selective trials and intimidation of Gbagbo's allies (ibid).

Evidently, Uganda, the DRC and Côte d'Ivoire demonstrate the constraints that the ICC's selective trials impose upon domestic peace processes. In a similar vein, Kenya's neo-colonial narrative undermined the Court's inputs in other conflicts scenarios in the region – South Sudan and Burundi.

#### **5.4.2. Kenya's neo-colonial narrative and African protectionism**

After Kenya's promotion of the neo-colonial narrative, potential ICC situations (Burundi and South Sudan), were subsequently shielded from the Court's prompt focus. As of the time of Burundi's 2015 violence, it was an ICC member state, hence the Court could potentially trigger jurisdiction either through a self-referral or the *proprio motu* provision. Conversely, for South Sudan, a non-ICC member state, the ICC could only derive jurisdiction via the UNSC's referral.

None of the ICC's three trigger mechanisms was promptly deployed to expedite the course of justice in the two countries. Burundi's and South Sudan's recent conflicts which warranted the Court's interventions followed much longer histories of protracted political problems.

Since gaining independence from Belgium in July 1962, Burundi has been entangled in political violence along clan, ethnic and regional fault lines (Vandeginste 2009, 66). Some of the episodes of Burundi's violence include in 1965, 1972, 1988, 1991, and from 1993 onwards (Leclercq 2017, 7). According to Nkurunziza and Ngaruko (2005, 2), grievances on poor governance and exclusion have fuelled cycles of violence and perpetual mistrust amongst the Tutsi and Hutu communities.

The 1993 violence was triggered by the assassination of President Melchior Ndadaye, a Hutu, which led to a civil war whereby many people were killed and institutions collapsed (Leclercq 2017, 7). After the signing of a peace agreement in Arusha, Tanzania, in August 2000, Burundi experienced relative peace under power-sharing arrangements.

Following the 2005 elections, the Hutu led National Council for the Defence of Democracy-Forces for the Defence of Democracy (CNDD-FDD) assumed state authority (Nindorera, 2012). Since then, the CNDD-FDD has dominated Burundi's political processes (ibid). The CNDD-FDD's decision in 2015 to back President Pierre Nkurunziza for a controversial third term in violation of the Arusha peace agreement sparked new waves of violence (International Crisis Group, 2016).

Thus, post-2015 Burundi was marked with fear, deepening social divisions, economic decline, urban guerrilla warfare, targeted assassinations, torture and disappearances (ibid). According to the UNSC (2017, 2) report of the Secretary General on Burundi, the violence led to increasing intolerance and harassment by the CNDD-FDD's youth wing – *Imbonerakure*. By February 2017, approximately 387,000 Burundians had dispersed from the country, with the figure projected to go higher (ibid, 2).

South Sudan gained independence in July 2011 from Sudan following a referendum that was part of the January 2005 Comprehensive Peace Agreement (CPA). The CPA sought to address some of the causes of civil wars that plagued Sudan between 1955 to 1972, and 1983 to 2004 (Grawert 2010, 1). At the centre of the civil wars were grievances against economic marginalization and exclusion from the Arab dominated government (ibid).

The second set of civil wars were fought by Sudan People's Liberation Army (SPLA), under the leadership of John Garang. After Garang's death in July 2005 in a plane crash, his deputy, Salva Kiir, was named his successor in August that year (Nguyen, 2005). Kiir became South Sudan's president after the South's independence, with Riek Machar as his deputy. Nevertheless, autonomy brought to the fore the salience of South

Sudan's ethnicity as a marker of identity and division, and a lack of national identity (Stigant 2013, 1).

Within the SPLA, factional politics escalated between rival factions of Kiir (a Dinka), and Machar (a Nuer). Afterwards, their rivalries spilled over into large scale communal violence, and a resurgence in the historical split between the Dinka and the Nuer (Stigant, 2013). The Dinka and the Nuer have historically been embroiled in localized conflicts over pasture and grazing land, a rivalry which was carried over in their wars for independence (Ayiei, 2014).

The first overt form of power struggles between the Dinka and the Nuer emerged from ideological differences between John Garan'g (a Dinka), and Samwel Gai Tut (a Nuer) in 1984, which led to their direct confrontations. As a result, Garan'g killed Gai Tut, after which another Nuer military leader, Abdallah Chuol, fought Garan'g forces with an almost entirely Nuer army (ibid).

More so, the Dinka-Nuer split culminated in a fully-fledged war in 1991 after Garan'g's and Machar's ideological differences over independence (ibid). Whereas Machar wanted the full separation of South Sudan from Sudan, Garan'g's vision was a unified new Sudan (ibid). With the disagreements developing into tribal warfare, both Garan'g and Machar orchestrated widespread massacres against each other's community, which led to Dinka and Nuer's further divisions and mistrust (ibid).

As such, Kiir's dismissal of Machar from the vice-presidency in July 2013 was perceived by the Nuers as "Dinkas' final step in silencing them in politics" (ibid, 1). These perceptions ignited ethnic animosities and triggered new waves of violence (ibid, 1).

Starting from December 2013, South Sudan's civil war resulted in "widespread and systematic attacks," and the commission of crimes against humanity, including murder, rape and other acts of sexual violence (UNMISS 2014, 3). More worryingly, by 22 April 2014, more than 78,000 IDPs had sought protection at the UN's bases, from an estimation of over 1,000,000 displaced across the country (ibid, 17).

The conflict temporarily came to a halt after mediation by the Intergovernmental Authority on Development (IGAD) in August 2015. The parties to the conflict agreed to the formation of a Transitional Government of National Unity (TGoNU), which was to embark on a raft of TJ initiatives in order to work towards more sustainable peace (IGAD, 2015). The parties to the conflict agreed on establishing the Commission for Truth, Reconciliation and Healing (CTRH), a hybrid judicial institution – the Hybrid Court for South Sudan (HCSS), and Compensation and Reparation Authority (CRA) (ibid, 40). These endeavours were envisaged as platforms of building "an inclusive and democratic society founded on the rule of law" (ibid, 3).

However, the feasibility of South Sudan's peace was undermined by the apparent lack of political will to exercise restraint and adhere to IGAD's recommendations on TJ. As the AU Commission revealed, many people in South Sudan did not have confidence in either the national judiciary or the political system to deliver accountability for the violence (AU 2014, 300). Moreover, in a 2016 New York Times opinion piece, Kiir and Machar (2016, 1) suggested that the country's unity was best guaranteed by pursuing peace as opposed to criminal accountability. According to them, it was better to grant amnesty to alleged perpetrators of the violence, even in the absence of their expression of remorse (ibid).



Furthermore, Kiir and Machar called on the international community, and more so the USA and the UK, to rescind their stances on the envisaged Hybrid Court for South Sudan (ibid). Instead, they proposed the path of pursuing truth and reconciliation processes (ibid). Additionally, timelines for creating the hybrid court were expunged in the final signed peace settlement, making the process open-ended (UN 2017b, 13). Also, at a 2017 meeting on TJ, the South Sudanese authorities reiterated their unwillingness to pursue the accountability path by declaring their preference for peace, as opposed to establishing the hybrid tribunal (Sudan Tribune, 2017).

South Sudan's TJ was significantly undermined by the collapse of the peace agreement in July 2016. After fighting erupted in Juba, Machar, together with hundreds of his soldiers, fled the country, leading to further escalation of the conflicts (Ainebyoona and Kasasir, 2016). The civil war continued from then, with the commission of atrocities by both the government and opposition forces (Human Rights Watch 2017b, 1).

Notwithstanding the South Sudanese authorities' blatant admissions of unwillingness to prosecute the atrocities, and the escalating humanitarian situation, the UNSC was hesitant to refer another African situation to the ICC. Such a referral would attract backlashes from the AU and individual African states. With the deadlocks in the UNSC in referring other potential situations, such as Syria, Yemen, and Israel/Palestine, an African referral would reinforce the arguments that the ICC is surely targeting Africans.

More so, regional human rights activists did not call for the UNSC's referral, but opted to support the tribunal's establishment, despite their reservations on its feasibility. A senior Amnesty International's official revealed that many human rights activists were

pushing for the tribunal, “because they did not want drama, and the ICC in South Sudan would be madness” (Interview, Nairobi, Kenya, 13 August 2015). The head of the EU delegation to the AU also backed the tribunal’s formation and indicated their readiness to support it (Barasa 2016, 1).

Revealing African protectionism, the AU commission’s recommendations on criminal accountability for South Sudan were loaded with such phrases as: “Africa-led, Africa-owned, Africa-resourced and the AU’s leadership” (AU 2014, 300). Instructively, the AU’s language left little room for manoeuvres with an international criminal intervention, in addition to sending a clear message that the ICC’s intervention was unwarranted in South Sudan. As a human rights activist argued, Kenya’s anti-ICC rhetoric and the AU’s collective action “created an environment where there is no alternative voice: the AU is governments, and the governments are the only voices,” which is certainly the most dangerous situation” (Interview, Nairobi, Kenya, 20 August 2015).

Similarly, in Burundi, prompt domestic action on the violence was limited because of the direct involvement of the CNDD-FDD regime. As a result, the ICC instituted preliminary investigations in the situation of Burundi (ICC, 2017d). This followed the OTP’s findings that the 2015 Burundian political crisis amounted to more than 430 civilian deaths, 3,400 arrests and over 230,000 forced displacements (ICC, 2017d). The OTP also noted that several communications and reports described acts of killing, imprisonment, torture, rape and other forms of sexual violence and enforced disappearances, which all fell within the ICC’s ambit (ibid). In September 2017, the OTP requested Pre-Trial Chamber III for an authorization to open investigations

*proprio motu* (under seal), which was granted on 25 October, before the maturity of Burundi's withdrawal from the ICC (ICC, 2017).

The ICC's decision to intervene in Burundi, and the country's eventual withdrawal from the Rome Statute were preceded by neo-colonial narratives that domestic political elites appropriated to shield them from justice. By deciding to withdraw from the ICC altogether, the Burundian authorities utilized a more radical version of Kenya's adversarial exchanges with the Court.

In efforts to curtail the ICC's action, Burundi's top government officials articulated the neo-colonial narrative in international and local spaces. For example, at an ASP meeting, the Burundian delegation alluded to the ICC's neo-colonialism, condemned the Court and warned of adverse consequences (Interview, CICC official, Kampala, Uganda, 27 January 2016).

Locally, political elites triggered debates on the ICC that were lauded with undertones of Africa's subservience to global powers, and a need for asserting sovereignty. These led to a final vote in the National Assembly, whereby the lower house voted for withdrawal from the ICC, after which the decision was unanimously endorsed by the senate (Ngendakumana, 2016). Afterwards, Burundi sent its notification to withdraw from the Rome Statute to the UN in October 2016 (UN, 2016). Given its actions, Burundi extracted "reputational benefits" from other African countries that pursue impudence from the ICC, an institution that is conflated with neo-colonial intentions (Vandeginste 2016, 3).

Explaining the withdrawal in the National Assembly, Justice Minister, Aimée Laurentine Kanyana, argued that the ICC is biased towards African suspects, and is

used by the West to exert pressure and domination on poorer states (cited in Ngendakumana 2016, 1). Furthermore, Minster Kanyana observed that there was no justification for Burundi's membership in the Rome Statute, because the Statute is "not respected anymore" and non-members have undue influence in its processes (ibid, 1). Hence, Kanyana declared that Burundi ought to defend its sovereignty from an "international conspiracy" that was determined to subvert a popularly elected government (ibid, 1).

Against the backdrop of domestic inaction, the UN Human Rights Council mandated a Commission of Inquiry on Burundi, which documented instances of atrocities. The commission believed that attacks on the civilian population that occurred since April 2015, amounted to crimes that were under the Rome Statute (UN 2017c, 13). Citing Burundi's impunity and lack of judicial independence, the commission called for a prompt ICC intervention (ibid, 16).

To open up Burundi for investigations, the commission called on the authorities to rescind their ICC withdrawal venture, cooperate with ongoing preliminary investigations, and continue with that cooperation, as well as ensure the protection of victims and witnesses (UN 2017c, 18). In turn, the Burundian authorities resorted to the neo-colonial rhetoric against the ICC.

For example, Willy Nyamitwe, the senior adviser to the Burundian President, declared that the report was authored by mercenaries to legitimize Western narratives, with the aim of inviting the ICC – the West's tool of enslaving Africans (cited in Ngendakumana 2017, 1). Likewise, a CNDD-FDD party official argued that the UN report was unimpressive due to its aims of facilitating the ICC's political motives in Africa, and

not justice (Ngendakumana 2017, 1). For a Burundian diplomat to Russia, the report was the ICC's and Western powers' vengeance for Burundi's intentions of withdrawing from the Court (cited in Egorov 2017, 1).

Burundi's neo-colonial claims were intensified after the ICC's decision to intervene following the preliminary examinations. Declaring Burundi's intentions of non-cooperation, Minister Kanyana stated that the Court decision confirmed "the politicization of human rights and international justice, as well as the attempt to destabilize African countries" (cited in AFP, 2017). Thus, in the event the ICC intensifies its intervention, Burundi's neo-colonial affront is likely to attract the AU's collective actions, given the regional body's history with the ICC, and recent condemnation of the Court's decision by the Ugandan and Tanzanian presidents (N'gwanakilala, 2017).

In sum, Africa's renewed protectionism against the ICC resulted in two sets of paradigms: protected African states and a cautious Court. With regards to the former, Uganda's Deputy Speaker declared Africa's intentions of abandoning the ICC if it continues to focus on African leaders (Amamukirori 2017, 1). Moreover, as a senior Jubilee administration official observed, there would be no ICC in Africa, if the Court's defendants continue to be exclusively Africans (Interview, Nairobi, 21 November 2015). These sentiments were premised on the view that an African focus reinforces discrimination, promotes imbalance, and cost reputation, which Africans would not tolerate (*ibid*).

For the ICC, the consequences of African protectionism caused more caution and restraint on its part, in order to avoid entanglements on the continent. As a human rights

activist revealed, “the ICC is now cautious, and the international community is careful too to refer matters. There is political and diplomatic baggage from Africa” (Interview, Nairobi, Kenya, 9 October 2015). Likewise, an ICC official talked of the far-reaching consequences of the neo-colonial narrative, thus:

The ICC cannot investigate cases it would like to, since then, it has to be cautious and selective about the cases it has to bring to trial ... but since the ICC’s mandate is to investigate serious breaches to international law, it therefore has to use the gravity test more carefully. (Interview, The Hague, Netherlands, 22 July 2015)

To summarize, the ICC’s inattention to deserving situations, such as Burundi and South Sudan (owing to African protectionism) compounds their internal challenges in overcoming accountability debacles. At best, Burundi’s TJ is described as disjointed with varying interests, preferences, and motives, thus undermining societal transformation (Leclercq 2017,1). Moreover, the challenges to Burundi’s TJ have led to multiple forms of injustice, including: denial of justice via ‘provisional immunities,’ denial of justice via negotiations geared towards paralysis, and potential imbalanced justice via the timing of the truth-telling process (ibid, 1).

In contrast, South Sudan is yet to embark on TJ processes, which could perhaps be accelerated with an active ICC intervention. As such, the Court would express a need for complementarity and victims’ centeredness, thus stimulating international cooperation towards these endeavours.

## **5.5. Conclusion**

So far, it is evident that the narratives on the ICC's intervention in both Uganda and Kenya portended as antithetical to domestic TJ discourses, with far reaching implications for other fragile societies on the continent. In Uganda and Kenya, the narratives reproduced and reinforced dominant but divisive binaries: the GoU's dichotomy of 'just' versus 'unjust' actors in the northern conflict, and Kenya's ethno-regional divisions.

Consequently, in Uganda, the ensuing binaries reinforced perceptions of injustices in the north, as all performances of the narrative contents of the past (traditional justice, amnesty law and the ICC interventions) were focused on LRA atrocities. This led to large amounts of silence amongst northerners, because of their limited opportunities in narrating alleged regime atrocities via formal platforms. In Kenya, the neo-colonial narrative departed from the aspirations of TJ by reinvigorating ethnic divisions along support for or opposition to the ICC. In so doing, the narrative propounded negative peace that subsumed narratives of differences amongst the antagonistic Kikuyu and Kalenjin communities.

Besides their domestic impacts on TJ mechanisms, the narratives had far reaching implications for other conflict situations on the continent, thus inventing the ICC's legacy. Whereas Uganda's selectivity had demonstration effects of the Court's malleability to misappropriation, the neo-colonial narrative renewed African protectionism, and fuelled a perception of the ICC as neo-colonial, which shielded several potential ICC situations from prompt interventions.

Worryingly though, Uganda's and Kenya's challenges on TJ were compounded by the dilemmas of complementarity that stemmed from contextual difficulties in effecting the innovation. The next chapter examines the dilemmas of complementarity in the two countries as further evidence of their impasses on TJ.

## Chapter 6

### **The dilemmas of complementarity**

With the onset of the ICC's interventions in Uganda and Kenya, it was anticipated that the principle of complementarity would contribute to domestic efforts at combating impunity atrocity crimes and strengthen the rule of law. In contrast, the principle achieved little success, even after international cooperation in performing positive complementarity – strengthening domestic legal, investigative and prosecutorial infrastructures.

This chapter presents the dilemmas of complementarity in Uganda and Kenya as indications of the limits of the ICC's normative imperatives that arise from complexities and competing paradigms in fragile societies. The two countries' complementarity stories provide insights on the transferability of some of the ICC's innovations to local spaces, against the backdrop of local contestations over legitimacy and authority in the nurture of post-conflict transitions. In so doing, the chapter revives the peace versus justice debate, which is a long standing discursive frame in sequencing the two paradigms in transitional societies. The debate is applied with regards to the applicability of the complementarity regime and its confrontation with realities on the ground.



Specifically, the chapter demonstrates non-compliance on complementarity as exhibited in the traction of amnesty in Uganda, and the Jubilee Alliance's pervasive peace over justice messaging. In the Ugandan situation, the chapter highlights amnesty's appeal as a pull factor for combatants to abandon rebellion, as well as its battles with justice due to the agency of some victims and powerful force of international norms. For Kenya, the chapter discusses the Jubilee Alliance's continued opposition to the ICC and promotion of 'peace' through persuasions (of the Kikuyu and Kalenjin communities), and coercion of justice advocates that increased the risks of social exclusion and security.

The next part of this chapter revisits the peace versus justice conundrum and locates the statutory obligations imposed upon domestic authorities to cooperate with the ICC, including on the principle of complementarity. Thereafter, the chapter attends to Uganda's and Kenya's experiences with complementarity and international cooperation towards these endeavours. The chapter then explains the two countries' dismal performances on complementarity, owing to the reinvigoration of the peace versus justice debate. More explicitly, this part discusses the traction of amnesty in Uganda and its battles with justice, and the Jubilee Alliance's peace narrative that undermined complementary trials for the 2007/2008 PEV. Finally, the chapter concludes by suggesting that the two countries' experiences offer a more nuanced explanation for the remote success of the complementarity regime, rather than arguments in favour of impunity. Indeed, the peace versus justice debate still reigns in nurturing post-conflict transitions, despite the significance of justice for long-term peace, and the ICC's innovations with such principles as complementarity.

### **6.1. The peace versus justice debate: the primacy of justice over peace?**

Perhaps, the establishment of the permanent ICC was an indication of the increasing recognition of the primacy of justice over short-term considerations for peace in transitions from conflict scenarios. Additionally, the Court's calls for international cooperation in prosecuting heinous crimes, together with its complementarity regime further stifled sympathies for the peace track.

With the ICC's articulation of the ever urgency for justice, Ugandan and Kenyan authorities were called upon to cooperate in prosecuting alleged perpetrators of mass atrocities, including by commencing complementary domestic trials. It is therefore critical to assess the GoU's and the Jubilee Alliance's compliance with the ICC on complementarity, given the former's cooperation with the LRA's prosecutions at The Hague, and the latter's defiance to international justice.

Over time, the peace versus justice debate has informed ideational paradigms regarding transitions of post-conflict societies to long-term peace (Hale, 2017; Oette, 2010). Central in the conundrum are discussions on whether to pursue one track over the other, or the appropriate sequencing of the two tracks. Thus, even if justice and peace were to co-exist, there are differences of opinion on how to strike a balance between the approaches to attaining peace and justice (Keller 2008, 14).

Weighing in on the peace versus justice dilemma, the Overseas Development Institute (ODI) expresses the difficult choices that transitional societies have to make in overcoming past abuses, while also undertaking peace-building (ODI 2009, 1). Whereas inaction emboldens impunity and propagates feelings of loss, injustice, trauma and exclusion amongst victims, the justice track can undermine peace initiatives

especially where perpetrators are still powerful (ibid, 1). The former ICTY and ICTR chief prosecutor, Richard Goldstone, opines that at the beginning, prosecutions might undermine peace processes, while trials have also helped, rather than undermine peace deliberations (Goldstone 2005,421).

To some observers, the peace versus justice conundrum is unwarranted or even a false dichotomy. For example, the International Center for Transitional Justice (ICTJ) argues that there has been a significant shift in the practice of exempting powerful perpetrators from justice during peace negotiations (ICTJ 2011, 1). According to the ICTJ, achieving lasting peace depends on criminal accountability, rather than the immediate aims of conflict termination (ibid, 1). Likewise, Meron (2011, 157) concludes that the peace versus justice dichotomy is incorrect, and that justice is a significant ingredient to peace and reconciliation.

Nevertheless, proponents of the justice track also agree on a need for sequencing, given that criminal trials are only possible when a certain level of peace is in place. By the same token, the drafters of the Rome Statute contemplated the UNSC's deferral of the ICC's proceedings in case they pose a significant threat to international peace and security.

Turning to the primacy of justice over peace, it has been argued that the former lays the base for a culture of accountability in fragile societies, despite its threats to peace negotiations (Mendez and Kelley 2015, 481). In this regard, justice should not be subject to bargaining, predisposed to the whims of peace processes, and it must work on its own separate channels (ibid). There are also suggestions that notwithstanding the

contestations on the deterrent effects of ICJ, it is obvious that a culture of impunity bolsters the commission of atrocities, or intensification of ongoing conflicts (ibid, 483).

Furthermore, the recitals in the preamble of the Rome Statute indicate the international community's conscious decision to connect peace and justice (ibid). In the preamble of the Statute, the global community: affirms "that the most serious crimes must not go unpunished,"<sup>23</sup> is "determined to put an end to impunity for the perpetrators of these crimes,"<sup>24</sup> and "recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."<sup>25</sup> These aspirations were predicated on the notion that "such grave crimes threaten the peace, security and well-being of the world."<sup>26</sup> In this regard, Mendez and Kelly (2015) rightly asserted that the ICC created new rules which actors must adjust to, such as on international cooperation and the complementarity regime.

The most overt speculations of the peace versus justice debate within the Rome Statute are Articles 53 (1) (c) and 53 (2) (c), that provide for the OTP's discretions on whether to proceed with investigations "in the interests of justice." Nevertheless, a 2007 internal OTP policy paper on "the interests of justice" settled the speculations (ICC, 2007). In it, the OTP clarified that Article 53 would be invoked in exceptional circumstances, and that there is a presumption in favour of prosecutions. The OTP also argued that the

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<sup>23</sup> Preamble, Rome Statute.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

interests of peace fall under the ambit of other institutions and not the ICC (ibid, 4). Finally settling the speculations, the OTP concluded that “the issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms: it is the law” (ibid, 4).

Moreover, the OTP affirmed that adulteration of justice results in unabated cycles of violence, given the past precedents of peace negotiations (Bensouda, 2013). For this reason, the OTP concluded peace should be achieved through justice (ibid, 1). Thus, in order to guarantee long-term peace, Ugandan and Kenyan authorities were under statutory and normative compulsions to match the ICC’s trials with complementary domestic prosecutions for their incidents of mass atrocities.

## **6.2. Putting complementarity into practice**

Besides statutory obligations to comply with the Rome Statute, complementarity expounded a division of labour between the ICC and domestic mechanisms. Ideally, Uganda’s and Kenya’s implementation of the passive variant of complementarity would strengthen national rule of law programmes, and avail avenues of justice to many victims of the northern conflict and the 2007/2008 PEV. In so doing, complementarity would provide a more realistic account of the international community’s aspirations of constructing a moral universe, in which impunity for heinous crimes is confronted.

As a first step towards complementarity, the urgency for criminal accountability for the northern conflict was expressed in the Juba peace negotiations, and during discourses amongst interested parties. At Juba, several informal discussions were held with the LRA, in which it was clarified that accountability would be part of any final settlement (Wierda and Otim 2011, 1164). The LRA delegation was also reminded that the

international community and the affected populations were intolerant to any peace agreement with amnesty clauses (ibid). As an official in the DPP's office revealed, they could not watch impunity unfold for the LRA atrocities in defiance of international norms, due to their capacity as an institution charged with criminal justice (Interview, Kampala, Uganda, 31 March 2016).

Notwithstanding the GoU's stated intentions of complying with the obligations to prosecute atrocity crimes, the authorities encountered considerable domestic resistance from ongoing amnesty processes. To a significant number of many combatants, amnesty appealed as a pull factor to abandon rebellion and rebuild their lives, as opposed to the threats of prosecutions. To this end, Uganda's complementarity ventures only roped in one former LRA commander, Thomas Kwoyelo, whereas the amnesty process is still on course.

In the Kenyan situation, and as mentioned in Chapter 3, a handful of low and mid-level suspects of the 2007/2008 PEV were prosecuted at the High Court, while most of the alleged perpetrators remained at large (Human Rights Watch, 2011a). Moreover, governance and human rights activists, notably KPTJ, worked with some victims to push the accountability agenda. KPTJ's efforts led to harnessing many victims' voices, and their mobilization into a community of justice (Interview, CSO official, Nairobi, Kenya, 8 February 2016). As a result, some victims sought redress in court, including on reparations for SGBV, police brutality and forced displacements (Interview, human rights activist, Nairobi, Kenya, 20 August 2015).

Yet, all mid and higher level, and the vast majority of low level suspects still remained at large because of the Jubilee Alliance's stiff opposition to criminal accountability for

the 2007/2008 PEV. The Jubilee Alliance's opposition to the ICC's intervention extended to the complementarity regime, under a pervasive peace messaging that was enforced by a combination of persuasions to the Kikuyu and Kalenjin communities and coercion of justice advocates. Consequently, the latter group was exposed to risks of social exclusion and security, particularly in the (Rift Valley and Central) regions that accounted for a substantial combination of victims and alleged perpetrators of the 2007/2008 PEV.

As further evidence of resistance to complementarity in Uganda and Kenya, there was no motion in effecting the principle, even after international cooperation in performing 'positive complementarity.' The basis for assisting Uganda and Kenya improve on their institutional and prosecutorial capacities was constructive (international) interpretations of inabilities, that called for sustained local-international exchanges in performing complementarity. However, this explanation was an error in judgement, as it departed from statutory interpretation of admissibility (Article 17), that hinted at local normative resistance to criminal prosecutions.

#### **6.2.1. Performing positive complementarity**

The proponents of positive complementarity envisaged it as a remedy for Uganda's and Kenya's institutional failures in prosecuting alleged perpetrators of mass atrocities. With assistance from transnational, international and local actors, the two countries accelerated steps at reforming their legislative, investigative and adjudicative capacities to enhance complementarity. Specifically, the two countries were assisted in drafting national ICC implementing legislations, training and hiring prosecutors, reforming national courts, and strengthening other prosecutorial functions.

It is important to note that some of the aforementioned reform initiatives coincided with routine rule of law programming and assistance from international actors. Parallel to reforming local institutions for complementarity, Uganda had a sector wide approach – the Justice Law and Order Sector (JLOS) – that is based in the Ministry of Justice. The JLOS is a multi-sectoral organ that links institutions that have close functions of justice administration and rule of law programmes, in order to come up with common action plans and policies (Republic of Uganda, 2017a). Likewise, Kenya had a cross-cutting institutional strengthening programme under the Governance, Justice Law and Order Sector (GJLOS) in the Justice Ministry (Republic of Kenya, 2017). In addition, the new constitution of 2010 triggered a plethora of reforms in Kenya’s administration of justice and the security sector.

The starting point of performing Uganda’s positive complementarity was at the Juba peace processes where the ICC’s normative framework had a bearing on the final settlements. A human rights activist who participated in the mediation reveals that pressure from the ICC guided how the agreements were crafted, with a clarity that there was no blanket amnesty (Interview, Kampala, Uganda, 3 February 2016). Towards this end, delegations at the conference had to “carefully navigate and propose measures that were not in conflict with the ICC and give it room to operate” (ibid).

Consequently, the ‘Agreement on Accountability and Reconciliation between the GoU and the LRA’ made references to the ICC in some of its recommendations. In the agreement, the parties stated their commitment to combat impunity and promote redress mechanisms that aligned to international obligations and the Rome Statute’s complementarity principle (Republic of Uganda 2007a, 1). Moreover, they agreed to



commit any alleged individual perpetrators of human rights abuses or international crimes to formal criminal and civil justice (ibid, 5). Subsequently, in the agreement's annexure, there was a provision for the establishment of "a special division of the High Court of Uganda" to affect the provision of criminal accountability (Republic of Uganda 2007b,3).

Therefore, the GoU created the War Crimes Division (WCD) within the High Court in 2008, and later renamed it the International Crimes Division (ICD). Justifying the ICD's establishment, the GoU argued that it was an ICC complementarity Court, in compliance with the Rome Statute and the Juba mediation agreement (Republic of Uganda 2017b, 1). Since then, the ICD has slightly departed from the norms of ICJ by expanding its jurisdiction to include terrorism, human trafficking, piracy and other international crimes, besides the traditional war crimes, crimes against humanity and genocide (ibid).

As a government official revealed, the ICD's judges were also trained and exposed to international crimes and tribunals in Sierra Leone, and in The Hague (Interview, Kampala, Uganda, 3 February 2016). There were also trainings at specialized levels and support to the ICD in developing its regulations (ibid).

To further perform complementarity, Ugandan authorities were assisted in drafting the ICC's implementation legislation. In so doing, the country adopted The Commonwealth's Model Law, which culminated in the International Crimes Act of

2010 (De Vos 2015, 386). The Act “gives effect to the Statute and provides for offences under Ugandan law corresponding to offences within the jurisdiction of that Court.”<sup>27</sup>

There were also efforts at improving Uganda’s witnesses and victims’ protection schemes. According to the UN Office for the High Commissioner of Human Rights (OHCHR), Uganda’s legislative and policy guidelines were inadequate in enhancing witnesses and victims’ protection and, hence needed to adapt to ICJ best practices (OHCHR, 2010). Subsequently, Ugandan authorities drafted a witness protection bill, which is pending adoption in parliament. Under the influence of the ICC’s precedents, the GoU also embarked on enhancing victim centeredness by: transforming the complaints desk into victims’ desk, conducting outreach, and appointing counsels for victims (Interview, judiciary official, Kampala, Uganda, 31 March 2016).

Summing up Uganda’s significant steps towards positive complementarity, an ICC outreach official narrated how,

The ICD is a concrete example of complementarity to the communities. Uganda has gone steps ahead. The question is, how does it become functional? They went to The Hague for a study visit. The witnesses’ protection borrows heavily from the Court. One of the most concrete things is the ICD. (Interview, Kampala, Uganda, 2 February 2016)

As in Uganda, Kenya’s ability to perform complementarity included improvements in domestic legal, investigative and prosecutorial capabilities. A human rights activist who followed Kenya’s journey on positive complementarity revealed that the

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<sup>27</sup> International Crimes Act, 2010

government embraced the concept, and was open to improving capacity (Interview, Nairobi, Kenya, 7 October 2015).

First, with the assistance of international actors, the National Assembly drafted and passed the International Crimes Act of 2008. In this vein, Kenya followed the commonwealth script that Uganda used in implementing a similar legislation (De Vos, 2015). Accordingly, the Act “made provision for the punishment of certain international crimes ... and enabled Kenya to co-operate with the ICC in the performance of its functions.”<sup>28</sup>

Second, Kenyan authorities mulled with the idea of establishing an International Crimes Division (ICD) within the High Court in 2012. According to the Judicial Service Commission (JSC), creating the ICD was the best bet for Kenya in order to comply with the principle of complementarity and uphold state sovereignty (Republic of Kenya 2012, 9). Also, the JSC noted that local trials have symbolic effects, including: setting examples and standards, and effecting the sanctity of the rule of law (ibid, 142). The JSC went further to show how the ICC’s inability to handle many cases constrains its role in combating impunity, hence a need to establish domestic systems (ibid, 139).

Following the Ugandan precedent, Kenya’s ICD was envisaged to have jurisdiction for traditional international crimes, and other transnational crimes, namely: drug trafficking, human trafficking, money laundering, cybercrime, terrorism and piracy (ibid, 39). According to the JSC, the ICD would adopt the ICC’s standards, with similar

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<sup>28</sup> International Crimes Act, 2008.

guidelines and modes of operation (ibid, 149). The JSC also proposed the establishment of a well facilitated and independent prosecution unit within the DPP's office to deal exclusively with international crimes (ibid).

To inspire public confidence, the chairman of the ICD steering committee revealed that they had completed consultations with most agencies and the civil society, besides visiting Uganda, Rwanda, Cambodia and The Hague to learn best practices (Barasa, 2013). Given the ICD's potential, its architects argued that it would determine the ICC's success in Kenya (ibid). This optimism was boosted by the DPP's revelations that out of some 5, 300 PEV which were under investigations, a multi-sectoral task force had settled on some 4,500 cases that were open for further investigations (ibid).

The ICD's envisioned establishment was welcomed in several quarters as a revolutionary concept in opening avenues for prosecuting many suspects of the violence. For instance, the Law Society of Kenya (LSK) hailed "the long overdue decision" as a crucial step for prosecuting mid-level perpetrators (Barasa, 2013). For his part, the German director of International Law at the Federal Foreign Office, Dr Pascal Hector, noted that the ICD was important because it would prosecute mid-level suspects and other serious crimes (cited in Barasa 2013, 1). Besides, TJRC's final report called for an acceleration of the ICD process (Republic of Kenya 2013, 9). Some victims also hailed the ICD proposal, arguing that it would increase their chances of prosecuting their tormentors (Amnesty international 2014, 32). Similarly, governance and human rights activists welcomed the ICD idea as part of the long search for justice for victims of the PEV (KPTJ 2014, 14).

In spite of the ICD's potential, it did not take off because of inadequate political will. Although a meeting was held in February 2014 with the judiciary, law enforcement agencies and development partners on the ICD's establishment, no concrete steps were followed through (Amnesty International 2014, 25). A former judiciary official revealed that the ICD was not a genuine effort at criminal accountability, but a scheme to frustrate the ICC's prosecution of Kenyan cases, and it was supposed to be "still born at birth" (Interview, Nairobi, Kenya, 22 September 2015). Indeed, Kenya's submissions at the ICC on case deferrals made reference to domestic investigative steps, including the new constitution of 2010 and a reformed judiciary.

Similarly revealing Kenya's unpreparedness to commence domestic proceedings with the ICD, a prominent human rights activist questioned the viability of the witness protection scheme amidst its budget reduction (Barasa 2013, 1). As the activist further posed, "What magic will we need as Kenyan leaders to generate the will to be fair in the ICD, when we have initially failed several times?" (cited in *ibid*, 1).

Overall, the performances of positive complementarity in Uganda and Kenya did not point in the direction of matching the ICC's trials at The Hague with domestic investigative and prosecutorial efforts. As Witte (2011, 7) rightly summarized, Uganda's main obstacles to complementarity were political and legislative. With Uganda's Amnesty Act allowing any former combatant to be exempted from prosecutions, there were misgivings on the feasibility of the ICD's motion with many cases (*ibid*, 7). In a similar vein, for Kenya, complementarity was undermined by political, rather than technical reasons (*ibid*). As such, the country has a fairly

established judicial infrastructure, a vibrant civil society sector and adequate human resources (ibid, 8).

The mismatch between Uganda's and Kenya's statutory obligations on cooperation with the ICC on complementarity, and resistances to the principle deserves a critical assessment. Explanations of the complementarity debacles in the two countries therefore need to take into account local precedents of dealing with the past vis-à-vis reception of the ICC's normative imperatives.

### **6.3. Expounding complementarity debacles**

Explanations of Uganda's and Kenya's complementarity fiascos lead to further notions of the ICC's confrontations with local perspectives on authority and legitimacy in the nurture of post-conflict transitions. Simply put, the ensuing clash between complementarity and domestic traditions and attitudes resulted in struggles for autonomy and validity of one approach over the other, or the appropriateness of the international or the local. Subsequently, the contestations between local and international standpoints of dealing with the past revived the peace versus justice conundrum, thus constraining the utility of complementary criminal prosecutions.

Notwithstanding the GoU's intentions of cooperation with the ICC on the complementarity regime, the authorities were also confronted with the traction of amnesty in many quarters as a feasible mechanism of conflict termination. As of March 2016, eight years after the ICD's establishment, more than 80 former LRA combatants underwent traditional cleansing rituals (with amnesty), at the headquarters of the Acholi Chieftdom in Gulu (Okot, 2016). On this note, traditional justice mechanisms

undermined the principle of complementarity in their dispositions as normative pedestals for amnesty processes.

Likewise, the Jubilee Alliance's opposition to the ICC and its normative imperatives undermined the prospects for complementary domestic trials for the 2007/2008 PEV. After Kenyatta and Ruto's elections in March 2013, it was evident that there would be no significant motion in the ICD. The clearest indication of the regime's unwillingness to commence trials for many of the PEV cases was the DPP's public declarations on the unviability of domestic proceedings. As the DPP asserted, "there is neither a reason nor a need to replicate the ICC models in the guise of an ICD ... opportunity was long lost when Parliament rejected the Special Tribunal Bill" (cited in Kiplagat 2014, 1). Given the Jubilee Alliance's promotion of the peace narrative under persuasions and coercion, there was little room for manoeuvre amongst victims and human rights activists who supported complementary trials.

#### **6.4. The traction of amnesty and its battles with demands for justice**

As in many other contexts around the world, the northern conflict was accompanied with intense national debates that were centred on the peace versus justice dichotomy. On the one hand, Acholi religious and cultural leaders were at the forefront of advocating for peace in the north, with amnesty proposals for the combatants. On the other hand, calls for criminal accountability grew louder and louder over the years. Demands for criminal accountability intensified with the ICC's intervention in 2004, and subsequent obligations on Uganda's cooperation on complementarity.

However, the GoU's ability to comply with the ICC on complementarity was constrained by the traction of amnesty amongst several constituencies, namely: the

GoU, the LRA, some victims and affected populations in the north. Contrary to retributive justice, amnesty portended as a pull factor for combatants to abandon rebellion and reintegrate into society. In this vein, amnesty's appeal subsumed the principle of complementarity's autonomy and legitimacy in shaping Uganda's post-conflict transition.

First, the GoU welcomed the proposals for amnesty from the Acholi religious and cultural leaders due to its contributions to conflict termination. Formalized in the Amnesty Act of 2000, the amnesty process continued to shape the GoU's efforts to end the northern conflict, despite their obligations on complementarity. As a senior official in the Amnesty Commission revealed, amnesty was about to go, but there was a justification for its extension – pulling out more than 27,000 LRA fighters who were potential killers from the bush (Interview, Kampala, Uganda, 5 February 2016). For many government officials, amnesty was a necessary evil that would still be relevant as long as rebels existed and remained largely unpredictable (Republic of Uganda 2013; Twinomugisha 2014, 11).

Second, to a significant number of the LRA combatants, amnesty was an assurance of personal safety, or a second chance to return home and rebuild their lives. For example, at the March 2016 cleansing ceremony in Gulu, an LRA returnee, Caesar Acellam, declared his gratitude for the community's gesture and acceptance irrespective of his past (Okot 2016, 1). Many other combatants also defected from the LRA, owing to their assurances of non-prosecution (Afako 2012; Cakaj, 2016). Indeed, and as Afako (2012, 1) has rightly suggested, amnesty has been a useful means of interrupting the LRA's solidity.



Third, amnesty appealed to the wider populations in the north that were mostly affected by the conflict. An Acholi elected representative argued that amnesty became more useful in the region because people realized that the government failed to resolve the conflict (Interview, Gulu, Uganda, 23 March 2016). Moreover, as he suggested, the nature of the people involved in the conflict contributed to amnesty's appeal (ibid). As he further claimed, "over 85 percent of the people did not join the war voluntarily, but they were forced, not as adults, but as young children who were abducted, brainwashed and turned into killing machines" (ibid).

An Acholi religious leader observed that their support for amnesty was informed by the reality that "they have so many children still in captivity, and amnesty sends voice to them in Eastern DRC, CAR and South Sudan to come back home" (Interview, Gulu, Uganda, 22 March 2016). According to another Acholi elder, amnesty has led to the return of over 20,000 children from LRA captivity, including victims of sexual abuse, and some of them have attained university education (Interview, Gulu, Uganda, 25 March 2016).

Collectively, among the Acholi religious and cultural leaders, support for the amnesty path followed the logic that the bulk of LRA fighters were forcefully abducted children, who were also dying in combat. In this strand of argument, complementary criminal trials for the LRA would be a disincentive for their calls to abandon rebellion and rebuild their lives. Overall, there were contentions that the abducted children were victims of the government's inability to protect them from harm (Republic of Uganda 2013, 14). In this regard, the LRA's configuration undermined the victim-perpetrator dichotomy that would call for criminal liability (ibid, 14).

Probed on amnesty, many northerners expressed their support for the provision. According to survey results, amnesty was considerably backed by direct and indirect victims, including: 80 percent in Soroti (Teso sub-region), 69 percent in Gulu (Acholi sub-region), 57 percent in Kitgum (Acholi sub-region), and 53 percent in Lira (Lan'gi sub-region) (Pham et. al 2015, 28). To a large degree, amnesty was supported in the north because of its deep roots in religious and cultural notions of reconciliation and forgiveness (Oola 2015, 159).

Given amnesty's support by a wide spectrum of the Ugandan society, it posed a critical challenge to the ICD's utility as a complementarity mechanism for the ICC's. In this vein, a Kampala based researcher noted how, "there is also a need to think of all sorts of history and cultural inputs, suspend normativity and look at how issues are locally internalized" (Interview, Kampala, Uganda, 27 January 2016). As the researcher further noted, the notion that the absence of prosecutions is equivalent to impunity is a very limited understanding that proposes justice as some kind of given with higher normative credentials (ibid).

Although implicitly, the ICC's prosecutor, Fatou Bensouda, also alluded to the traction of amnesty while appealing for the LRA to abandon rebellion in early 2016. Bensouda reminded the LRA that it was only Kony and Ong'wen who were sought for judicial proceedings at the ICC (ICC 2016a, 1). Bensouda also underscored the fact that out of the initial five arrest warrants the Court issued in 2005, only Kony's and Otti's (the latter since deceased) remain outstanding, and no other LRA fighters face imminent threats of prosecution (ibid). In addition, Bensouda lauded the "encouraging trends" of

many LRA returnees, and persuaded others to abandon rebellion and rebuild their lives amongst their families (ICC 2016a, 1)

Notwithstanding its traction, Uganda's amnesty law seemed to be in constant battles with criminal justice. This stemmed from (1) fragmentation of the victim community, (2) traditional justice enforcement dilemmas, and (3) the powerful force of international norms as espoused by the ICC.

#### **6.4.1. The fightbacks of criminal justice**

First, fragmentation of the victim community undermined the relative consensus on the utility of amnesty in Uganda's transition from the northern conflict. In spite of many victims' support for amnesty, some of them preferred criminal responsibility for the harm they suffered. This was revealed in a survey which showed that 37 percent of victims wanted the LRA leadership to be prosecuted, 29 percent opted for the LRA in general, 16 percent for the GoU, and 7 percent preferred the military's prosecution (Pham et.al. 2005, 26).

Furthermore, support for prosecutions was higher amongst respondents from non-Acholi areas (ibid, 26). In this regard, collective support for criminal trials stood at 44 percent in Gulu (Acholi sub-region), 61 percent in Kitgum (Acholi sub-region), 88 percent in Lira (Lango sub-region), and 68 percent in Soroti (Teso sub-region). Besides, some of the victims of the LRA's brutality in the DRC and CAR called for international support in holding the insurgents to account for their crimes (Human Rights Watch, 2010).

Second, the Acholi traditional justice that was positioned as an alternative to criminal accountability and a normative framework for amnesty has enforcement dilemmas. Given that it is based on voluntary consent of parties, there is no predictability in its performance for alleged suspects of atrocity crimes. As such, many LRA returnees opted out of the traditional rituals despite its utility in enhancing their reintegration into society. Additionally, the UPDF soldiers who allegedly committed atrocities in the northern conflict did not avail themselves for the rituals.

Questions also abounded on the generalizability and enforcement of Acholi traditional justice in Uganda's multi-ethnic society (Interview, professor, Kampala, Uganda, 13 January 2016). With each community having its own traditional justice mechanisms, the performance of one is associated with imposition or cultural imperialism (Interview, former CICC official, Kampala, Uganda, 27 January 2016). Moreover, efforts to codify the various forms of Acholi traditional justice were resisted because of concerns that they would lose their traditional flavour (ibid).

On the contrary, the ICC Act of 2010 and the ICD emerged as avenues for enforceable and expansive justice, hence their potential challenges to Uganda's amnesty processes. As a Ugandan lawyer noted, amnesty and the ICD are two legal paradigms, thus the former undermined complementarity by renditioning the peace versus justice conundrum (Interview, Kampala, Uganda, 2 February 2016). As such, the Amnesty Commission faced challenges from the JLOS, which opposed unconditional amnesty, as well as persistent questions of impunity vis-à-vis international norms as exhibited in the ICC (Interview, Amnesty Commission official, Kampala, Uganda, 5 February

2016). Hence, despite the Amnesty Commission's challenges to Kwoyelo's prosecution, the ICD proceeded with the trials in the interest of justice (ibid).

Nonetheless, the High Court upheld Kwoyelo's right to amnesty, which was in turn challenged at the Supreme Court by the DPP's office. Subsequently, the Supreme Court dismissed Kwoyelo's right to amnesty. The judges argued that the Amnesty Act was limited to crimes that were committed in furtherance of war or rebellion, and not attacks on innocent civilian populations (Republic of Uganda, 2015). According to the court, offences that fell within the ambit of Article 8 (2)(e) of the Rome Statute were to be prosecuted, since they were not in furtherance of war or rebellion (ibid). Alternatively, the court argued, pardoning the crimes would signify that other forms of violations should also benefit from amnesty (ibid, 43). The judges' decision was also inspired by the recommendations in the Juba peace agreement, which they cited as a demonstration of the GoU's and the LRA's full understanding that there would be individual criminal responsibility for northern conflict atrocities (ibid, 44 - 46).

After the Supreme court's verdict, some local observers suggested that the peace or amnesty versus justice debacle was settled with the court's ruling validation of Kwoyelo's trial at the ICD (Interview, lawyer, Kampala, Uganda, 2 February 2016). In this vein, a Judiciary official remarked that the Supreme court precedents opened up avenues for domestic prosecutions of the northern conflict (Interview, Kampala, Uganda, 4 February 2016).

The official also revealed that the Judiciary is working on a TJ Act, which will encompass amnesty and its provisions (ibid). The TJ Act will repeal the Amnesty Act, which is no longer reviewed after every two years (ibid). Nevertheless, the official also

commended amnesty for the return of many abductees, hence its continuation as part of the TJ law, that will apparently also include aspects of traditional justice, truth-telling, and reparations (ibid).

Whereas Uganda was confronted with the choice between amnesty and criminal accountability for perpetrators of the northern conflict, Kenya followed a trajectory of *de facto* immunity for the vast majority of low-level and all mid and upper-level perpetrators of the 2007/2008 PEV. With the Jubilee Alliance's peace over justice narrative that favoured short-term relations between antagonistic Kikuyu and Kalenjin communities, demands for complementarity were constrained with risks of social exclusion and security. These risks were more pronounced in the Rift Valley and Central regions that accounted for significant proportions of alleged perpetrators and victims of the poll violence.

#### **6.5. The Jubilee Alliance's peace messaging, *de facto* immunity and risks of social exclusion and security**

The main challenge to Kenya's compliance with the principle of complementarity was the Jubilee Alliance's peace over justice messaging that not only departed from domestic criminal accountability for the 2007/2008 PEV, but also stifled voices that advocated for justice. This followed a similar pattern of the Alliance's rejection of Kenyatta's and Ruto's ICC prosecutions in their quests for authority and legitimacy in nurturing Kenya's post-2007 transition. As a Jubilee Alliance supporter signalled the continuous and impending battles between the international and the local, "the ICC is contradicting local due process ... the greatest contradiction is that we agreed on the basis of forgiveness" (Interview, Nairobi, Kenya, 2 October 2015).

The Jubilee Alliance made specific references to a need for restoring relations between the antagonistic Kikuyu and Kalenjin communities that collectively shared a mix of victims and perpetrators, as well as physical spaces in the Rift Valley violence epicentre. As such, the Jubilee Alliance argued that resort to retribution would undermine the ‘negative’ peace they had cultivated since the 2007/2008 political crisis. Given such circumstances, together with the Jubilee Alliance’s legitimacy as state authority after the 2013 elections, the principle of complementarity and its proponents stared at the risks of domestic alienation.

After forming a government, the Jubilee Alliance made a deliberate policy decision not to prosecute alleged perpetrators of the PEV, whether they were in the low, mid or high-level cadres. Subsequently, *de facto* immunity became the ‘unofficial’ government policy on dealing with the alleged suspects of the violence. More so, the policy was enforced by covert and overt measures, namely; inattention to the witness protection scheme, a hostile political environment for criminal accountability, and non-cooperation on the part of investigative agencies.

In this sense, I deliberately use the term *de facto* immunity because unlike the GoU, the Jubilee Alliance did not contemplate or propose an amnesty law to validate rejection of domestic criminal trials. Instead, the Jubilee Alliance administration opted for public declarations and inaction on the bulk of the PEV cases, which the ICD was envisaged to investigate and prosecute.

To illustrate, in one of President Kenyatta’s public deliberations on accountability for the PEV, he reminded Kenyans that their options were not limited to retributive justice (Republic of Kenya, 2015). Instead, Kenyatta advanced the necessity of restorative

justice for the country's peculiar circumstances (ibid). In so doing, Kenyatta claimed that restorative justice carried great promise because of its deep roots in Kenya's cultural and historical realities (ibid). Kenyatta premised his assertions on the fact that the PEV was both political and communal, and that his government was founded on reconciliation that many Kenyans had also tried to forge with one another (ibid).

Expounding the Jubilee Alliance's peace overtures, one of Kenyatta's staunch supporters argued that although the peace message was misunderstood, it presented the best chances for inter-ethnic dialogues and foundation for a united nation (Wambugu 2016, 1). Moreover, it was suggested that the Jubilee Alliance's process of unity process began from the extremes of the Kikuyu and Kalenjin, from which it would be expanded throughout the country (ibid, 1)

Although many would argue that the Jubilee Alliance's rejection of criminal accountability was a convenient cover for impunity, they also agree that it gained significant traction amongst the majority of its targeted constituencies – the Kikuyu and Kalenjin communities. For instance, a prominent human rights activist who contested Kenya's peace versus justice conundrum also contended that perhaps the imbroglio holds "because of the Rift Valley's historical past and people's deep grievances which remain unaddressed" (Interview, Nairobi, Kenya, 2 March 2016).

Notwithstanding the wide acceptance of the Jubilee Alliance's peace message amongst their targeted constituencies, its pronounced non-acceptance, which was conflated with support for criminal accountability, raised the risks of social exclusion and security in the Alliance's core support base. Thus, the peace message gained considerable traction through a mix of persuasions and coercion – with the former as fostering inter-



communal relations, and the latter risking social exclusion and security in the Rift Valley and Central regions.

#### **6.5.1. Acceptance of the peace message: persuasions and coercions**

The majority of the Kikuyu and Kalenjin were persuaded with the Jubilee Alliance's peace message as the best chance for the two communities' co-existence in shared physical spaces, especially in the Rift Valley. The ensuing Kikuyu-Kalenjin partnership was welcomed because of its significance in the national political arena where inter-ethnic alliances determine Laswell's (1936) conception of "who gets what, when and how."

More explicitly, the Jubilee Alliance's formation included elite-level bargains on how to share local level seats, and the shared benefits amongst the Kikuyu and Kalenjin masses (Lynch 2014, 103). As a Kalenjin youth narrated, their unity "was not just an emotional move, but tied to so many deals signed, including what the community expected, such as government positions" (Interview, Nairobi, Kenya, 2 October 2015). Simply put, the Jubilee Alliance was crafted as a coalition between the Kikuyu dominated TNA, and the predominantly Kalenjin URP on a 50-50 power sharing basis (Kisia, 2012).

With regards to shared physical spaces in the Rift Valley, a Kikuyu youth believed that his community encroached on Kalenjin traditional homes (Interview, Nairobi, Kenya 2 March 2016). Hence, according to the youth, it was important that they cultivate special relations with their 'hosts' because of the large Kikuyu population, and limited land at their ancestral homes in Central (ibid). For these reasons, he concluded, co-

existence with the Rift Valley communities and continuity of livelihoods was more important than justice (ibid).

For his part, a Kalenjin youth praised the choice for peace, given that the community fought for their land and had no goodwill for prosecutions (Interview, Nairobi, Kenya, 23 February 2016). Another Kalenjin interviewee observed that prosecutions would open old wounds, and they had no interest in them because the major issues for the PEV were unaddressed injustices (Interview, Kalenjin youth, Nairobi, Kenya, 17 February 2016).

The aforementioned sentiments from the Kikuyu and Kalenjin interviewees befit the ‘immigrant-guest metaphor’ that outlines the construction of oppositional identities and expected code of conduct in “geospatial imaginaries” (Jenkins 2012, 577). In political transitions, the metaphor is propounded by political elites and other actors to govern rule-based behaviour amongst guests, such as complying with political inclinations of ‘hosts’ (ibid, 577)

Given their positionality as ‘guests’ in the Rift Valley, the Kikuyu were constrained in their endeavours to pursue justice for the atrocities they suffered. In this regard, a Kikuyu peace activist based in the region concluded that “there was no degree of local demands for justice and instead, people opted for restorative justice” (Interview, Nakuru, Kenya, 23 February 2016). Moreover, the activist revealed that prospects for criminal accountability were diminished by generalization of guilt, as opposed to individual attribution (ibid). Thus, in case of identification of perpetrators, “the communities will come in defending one of their own and so it is a complex issue” (ibid). Whereas some victims could identify their tormentors with such expressions as

“I know my neighbour who killed my brother,” they did not pursue justice for fear of reprisals (ibid).

Similarly, in the Central region, demands for criminal justice were muted by the potential risks involved. On the one hand, many Kikuyu believed that prosecutions could include some of their leaders who engaged in retaliatory attacks. On the other hand, there were fears that the trials could rekindle hostilities between the Kikuyu and Kalenjin, given the intensity of the violence in the Rift Valley.

With regards to the latter outcome, many in the Jubilee Alliance from Central believed that resorting to criminal accountability would potentially destabilize their newfound political coalition and benefit their rivals from other communities. In this vein, a Jubilee Alliance activist observed that due to the sensitivity of criminal trials for the 2007/2008 PEV, they could not open a can of worms, and arrests in the Rift Valley would suggest targeting their Kalenjin counterparts (Interview, Nairobi, Kenya, 25 September 2015).

In a similar vein, the IDP network amongst the Kikuyu that was demanding for criminal justice was told to “keep quiet and stop disturbing the peace” (Interview, CSO official, Kisumu, Kenya, 5 November 2015). The victims were also reprimanded that their demands for justice would target the Kalenjins, in addition to signalling a partnership with the opposition and CSOs to bring down the government (Interview, Jubilee Alliance activist, Nairobi, Kenya, 25 September 2015).

Beyond the Jubilee Alliance’s endorsement and expression of *de facto* immunity for many alleged perpetrators of the 2007/2008 PEV, compliance was enforced through a combination of mechanisms. These consisted of deliberate actions and tactical errors

on complementarity, which increased risks of social exclusion and security for the justice community.

#### **6.5.2. Enforcing compliance with the *de facto* immunity**

In order to enhance compliance with the Jubilee Alliance's *de facto immunity*, risks of social exclusion and security were intensified with errors on omission and overt coercions on proponents of criminal accountability. Of great concern was the reality that the discussions on the anticipated ICD were unfolding amidst official opposition to criminal justice (KPTJ 2014, 9).

Besides, investigative agencies, such as the police and the DPP, adopted non-cooperation on prosecuting the PEV cases, in addition to publicly commenting on their unviability (see for example, Kiplagat, 2014). Also, on several occasions, the Jubilee Alliance MPs passed motions in the National Assembly to repeal the International Crimes Act that provided for Kenya's cooperation in investigating and prosecuting mass atrocities.

Furthermore, the country's witness protection scheme was not strengthened, which undermined its independence and public confidence. Instead, in a 2016 amendment to the Witness Protection Act, state authorities, including the AG and heads of security agencies, were incorporated in the Witness Protection Agency (WPA) board. This was despite the security agencies' alleged roles in the 2007/2008 PEV as direct and indirect perpetrators. The WPA was also underfunded, such as its allocation of Kshs. 2.2 million out of a request of Kshs. 500 million in the 2013/2014 financial year when debates on accountability for the PEV were at a peak (KPTJ, 2014).

Ultimately, Kenya's weak witness protection programme undermined complementarity by inspiring intimidation on the part of the most vulnerable groups. If the OTP regularly complained about witness intimidation and interference in the Kenyan ICC cases, what would become of domestic trials? Writing on the predicaments of witnesses, Lynch (2015, 2) documented their extremely difficult circumstances, including exposure of their identities to co-nationals, some of whom were co-opted by political elites. A case in point of the witnesses/victims' precarious situation was the January 2015 abduction and murder of Meshack Yebei, an ICC witness, from his home in the Rift Valley (Cherono, 2015). More worryingly, the police did not make any serious attempts into conducting investigations into Yebei's murder. Likewise, human rights activists who supported accountability efforts were subjected to intimidation and harassment by the Jubilee Alliance and some of their supporters. For instance, in the Rift Valley, a prominent human rights activist was threatened and declared an enemy of the Kalenjin due to his advocacy against political violence and strong support for the ICC (Lubanga 2016, 1). In October 2013, the activist claimed that his life and that of his family were in danger, and that he had received threats from bloggers, political leaders and rebuke from a vernacular radio station (Lesiew, 2013). The Jubilee Alliance was also intolerant to its members who were perceived to be accommodative of criminal accountability for the 2007/2008 PEV. A Jubilee Alliance interviewee revealed that although some of their MPs consciously believed in recourse to criminal justice, they were obligated to be seen as antagonistic, failure to which they were sanctioned (Interview, Nairobi, Kenya, 9 February 2016). For instance, Priscilla Nyokabi (MP), who initially supported the ICC's intervention during her previous

stints in the civil society was targeted for disciplinary action, after which she changed her demands (Interview, Jubilee Alliance activist, Nairobi, Kenya, 25 September 2015).

When serving as the Executive Director of Kituo cha Sheria, a local human rights organization, Nyokabi (2011, 26) argued that the ICC process gave voice to victims. Further, she argued that many Kenyans hoped that the Court would reveal the truth and punish perpetrators of the violence (ibid). Conversely, after her censure, Nyokabi narrated how she no longer worked for the civil society, but was an elected MP on TNA, and served the Jubilee Alliance diligently (Mosoku, 2014). Nyokabi also professed her complete belief in the Jubilee Alliance development agenda, and the leadership of President Kenyatta and his deputy, Ruto (ibid).

Perhaps, the final collapse of the ‘Ocampo Six’ cases after the April 2014 ruling on Case 2 (Sang and Ruto) (ICC, 2016) attested to the probable social exclusion and security risks that would be associated with domestic complementary trials. Victims and the wider citizenry responded on the ruling depending on their physical locations. Whereas victims in the Rift Valley and Central regions were happy with case termination, those in safer spaces and distant ethnic politics from the Jubilee Alliance, such as in Nyanza and western regions, were unhappy with the verdicts.

To demonstrate, a victim from the Rift Valley reacted to the ICC’s ruling by “sincerely thanking God for hearing his cry,” and that his heart “was now at peace now that the cases have been thrown out” (cited in Daily Nation 2016, 1). Moreover, he “wished Deputy President William Ruto and Joshua Arap Sang the very best,” and noted that

he had “since forgiven the attackers, it is all history and we should now preach peace and reconciliation, and move on” (ibid, 1).

Similarly, a victim from Burnt Forest in the Rift Valley expressed his confidence in the case termination, thus: “I am glad the ICC issue is now behind us ... we are now optimistic that the Rift Valley region which was hardest hit by the violence will experience peace and development” (cited in ibid, 1). An IDP chairperson also welcomed the court ruling by narrating how she was “overwhelmed with joy following the dismissal of the case ... believed all will be well and was satisfied with the ICC decision” (cited in ibid, 1). Another victim in Central said that “we are happy with the ICC decision to terminate the case against Mr Ruto and Mr Sang ... The DP has been in the forefront resettling IDPs and he should now remember those who have been forgotten like us” (cited in ibid, 2).

On the other hand, many victims from Nyanza and western regions expressed their disappointments with the ICC’s decision. For example, one victim from Nyanza observed that the “ICC prosecutor Luis-Moreno Ocampo did a shoddy job in the Ruto-Sang case. The dismissal of the case is a delay for justice to the victims of the violence” (cited in ibid, 2). Additionally, a peace-building expert revealed that the victims from these regions were more outspoken, less worried about their safety and spoke more freely because of a safe social network (Interview, Nairobi, Kenya, 10 March 2016).

Perhaps, lending credence to the difficulties of individual criminal liability for the 2007/2008 PEV, a human rights activist revealed that they filed PEV related cases in the High Court of Kenya, which sought government’s liability for failing to protect

citizens as well as reparations (Interview, key informant, Nairobi, Kenya, 28 August 2015). They however did not seek individual criminal liability in their court pleadings.

## **6.6. Conclusion**

The arguments in this chapter locate the underwhelming performance of the complementarity regime in Uganda and Kenya within a reinvigorated peace versus justice debate, as well as the suppression of critical voices in support of the justice track. As such, the chapter offers a nuanced explanation of the minimal achievements of this important innovative principle of the ICC's system of justice – complementarity.

This is contrary to regular accusations of impunity as is common practice from some criminal justice advocates, while discerning the failures of the Ugandan and Kenyan situations with complementarity. Indeed, and as Akhavan (2016, 1056) observed, there is a wide gulf between stating and practising complementarity, which is symbolically manifested in the distance between the ideal conditions at The Hague, and the chaotic reality of societies emerging from mass atrocities. In this regard, it might be easier to criticise local conceptions of justice from the vantage point of global justice, than to confront difficult realities and desperations amongst victims (ibid, 1056).



Although both Uganda and Kenya passed the ability test after performing positive complementarity, the former's traction of amnesty and the latter's peace over justice messaging were significant obstacles to converting commitments into concrete actions. To this end, Uganda had to contend with amnesty's utility in dealing with alleged perpetrators of the northern conflict, despite the ambitions of the complementary ICD. For Kenya, the Jubilee Alliance's peace messaging was persuasive to the majority Kikuyu and Kalenjin in the Rift Valley and Central regions. Though unattractive for many justice advocates and long-term peace, the peace narrative proved useful for cessation of hostilities and subsequent peaceful co-existence among members of the two antagonistic communities, at least in the short-term. For these reasons, the ICD is not likely to take off, and various state agencies will continue with non-cooperation in investigating and prosecuting the bulk of the 2007/2008 PEV cases under the Jubilee Alliance administration.

The Ugandan and Kenyan failures on complementarity demonstrate that there are real struggles and legitimate concerns in balancing the immediate needs for peace and demands for criminal justice. The complementarity dilemmas link to broader notions of the contest for autonomy and legitimacy between the international and the local, in the quest for shaping post-conflict transitions.

## **Conclusion**

### **Between domestic precedents and the International Criminal Court's normative imperatives**

This thesis has sought to explain the aspirations of the international community towards the construction of a moral universe whereby perpetrators of mass atrocities are to be punished, but also the push-backs to these visions due to challenges on the universality of ICJ. Some of these challenges arise from different power positions and goals on ICJ amongst actors and institutions in the spatial hierarchies that inform interactions on the ICC's interventions. In turn, the challenges open up the Court's interventions to politicization in local spaces, albeit with negative impacts on TJ discourses and other conflict scenarios.

The ICC's contribution in the discussions about the moral universe obtains from its universality of criminal justice for atrocity crimes, as opposed to *ad hoc* tribunals or national jurisdictions. The Court potentially intervenes in unable and/or unwilling situations through three trigger mechanisms provided in the Rome Statute: UNSC

referrals (Article 13(b)), state referrals (Article 14), and *proprio motu* provision (Articles 13(c), 15 and 51 (1)).

Collectively, the ICC's intervention abilities, focus on the most responsible perpetrators of mass atrocities, and innovations on victim centeredness, international cooperation and complementarity, point to its normative imperatives. These attributes endear the ICC to relative universality, including: a 123 states' membership across the world's regions, the UNSC's acceptance, and the Court's special relationship with the UN system. More significantly, the UN Secretary General has since mainstreamed the ICC's proactive role in the TJ doctrines that are prescribed for transitional societies.

Notwithstanding the relative global acquiescence on the ICC's universality, domestic precedents of politicizing some of its interventions portends as a critical drawback in the war on impunity for heinous crimes. In some of its foremost interventions, such as in Uganda and Kenya, the ICC was immersed in contestations for power, authority and legitimacy amongst local protagonists, and between the local and the international. This resulted in global-local exchanges, which culminated in the construction of glocal spaces under which the Court's interventions were permeable to politicization, to the detriment of its investigative steps and legacy in situation countries.

More specifically, the ICC's interventions in Uganda and Kenya were clouded in narratives of selectivity and ne-colonialism amongst some of the critical local constituencies. Further, the narratives were antithetical to TJ discourses in local spaces, and by extension, in other regional situations, such as the DRC, Côte d'Ivoire, South Sudan and Burundi.

By the same token, the ICC's principle of complementarity was resisted in both countries under study, owing to contextual adaptations to international norms. Specifically, in Uganda, traditional frameworks of providing redress to the past, such as amnesty and Acholi cultural systems, posed significant obstacles to complementarity, despite the government's intentions of compliance. Likewise, Kenya's Jubilee Alliance expressed a pervasive peace over justice messaging on the 2007/2008 PEV, which constrained efforts at domestic complementarity prosecutions.

Thus, so far, the international community's aspirations towards the construction of a moral universe and the backlashes on this endeavour raise important questions. The two competing and contrasting paradigms feed into, and reminisce, broader debates on tensions between the concepts of global governance and sovereignty. As the old adage goes; "It seems that the concept of sovereignty is not withering and global governance seems to be intruding into withering sovereignty." For the purposes of these discussions, the international community's ambitions of constructing a moral universe, with the ICC as its apex, is conceived as a pointer to global governance. Despite some levels of success on the Court's establishment, and its successive interventions, the intrusion of global governance into domestic realms is also resisted by domestic political elites.

Most evidently, the latter outcome was the orchestration of transactional and adversarial exchanges on the ICC's interventions, as in Uganda, Kenya, the DRC, Côte d'Ivoire and Burundi. Perhaps, the political elites' prominent roles in shaping domestic uptake of ICJ is indicative of their claims to stakes in national sovereignties. Therefore, acceptance and resistance to the ICC in equal measure reveals two interesting

dynamics: the powerful force of global governance, and the limits state actors impose upon it.

With regards to the power of global governance, there is a degree of acquiescence on what the ICC can do, that is beyond domestic actors and institutions. As Paris (2015, 1) rightly notes, pluralism unlocks the possibilities of tackling an increasing number of complicated problems that transcend national boundaries, especially in recent times when the utility of traditional international organizations is under question. Similarly, Slaughter (2004, 285) observed that there is a remarkable shift towards linking sovereignty to participation in international institutions that enhance state cooperation in achieving what would traditionally be done alone under territorial confinements. Notably, and as the Ugandan and Kenyan cases have demonstrated, there is great value in the ICC, especially its ability to overcome domestic conundrums on criminal accountability for mass atrocities by overriding local conflict narratives.

To illustrate, Ugandan authorities declared themselves unable, though willing, to prosecute the LRA, which had shifted bases to CAR, South Sudan and the DRC. Consequently, after the referral of the LRA to the ICC, the GoU managed to galvanize international support in efforts to arrest and prosecute the insurgents. Moreover, Uganda's domestic mechanisms – amnesty, traditional justice and reintegration programmes – were bottlenecks in the country's ability to prosecute alleged perpetrators in the northern conflict. Even though the GoU could argue that amnesty was not to be extended to the LRA top leadership, its traction in encouraging combatants to abandoned rebellion still limited the country's envisaged complementary trials at the ICC.

Similarly, in the Kenyan situation, the ICC's intervention in the 2007/2008 PEV broke the cycle of impunity for powerful political elites who would otherwise not face justice in any Kenyan court. In this regard, MPs refused to pass laws in parliament to establish a Special Hybrid Tribunal, which further widened the impunity gap in the country. Hence, in the immediate aftermath of the PEV, the majority of Kenyans, including Kenyatta and Ruto, welcomed the idea of the ICC's intervention, due to its ability to overcome domestic deadlocks on criminal accountability for the PEV. More so, long after the ICC's trials of the 'Ocampo Six,' Kenya could not establish the much talked about ICD that was supposed to complement international efforts.

On the contrary, there are also limits to the force of global governance, which alludes to arguments that sovereignty is still a powerful construct. For example, the ICC is limited in preventing political elites from defining what is permitted within 'their' territory – domestic uptake of ICJ. It is on this account that the GoU dictated their referral agenda to the ICC, despite its notion of the universality of justice. For their part, the Jubilee Alliance resorted to adversarial exchanges which defined Kenya–ICC relations for the most part of Uhuruto's trials' timeline.

### **Beyond anti–ICC rhetoric in domestic and regional spaces**

From the Uganda and Kenyan experiences, it is clear that the powerful force of global governance weighed in on the ICC's acceptance, despite the salience of the narratives of selectivity and neo-colonialism. Admittedly, the narratives lowered the Court's acceptance amongst some critical constituencies, namely: some victims, the affected communities, and other interested parties in both countries. Certainly, the contestation of the selective referral by a significant number of northern Ugandans, and the

reception of the neo-colonial narrative amongst the Jubilee Alliance's core support base, affirmed the ICC's relative non-acceptance.

Even so, the ICC still enjoys considerable acceptance in the two countries, including amongst some of its foremost critics in the GoU, the Jubilee Alliance and the affected Acholi, Kikuyu and Kalenjin communities. To a large extent, the Court's acceptance obtains from its ability to overcome local conflict narratives and hold some of the powerful to account for their alleged crimes.

Owing to Kenya's, Uganda's and other African countries' fragility, the ICC plays a functional role as a 'safety valve' amidst turbulent ethnic neighbourhoods. Specifically, Uganda is ranked at position 21 and Kenya 23, with alert warnings in the Fund for Peace's 2015 global fragility index (Messner et.al., 2015). The Fund for Peace predicates state fragility on resource-driven competitions, poor leadership and corruption, and unaddressed grievances amongst various groups (ibid, 16).

Signalling the ICC's relative acceptance in northern Uganda, an Acholi elected representative argued that although the Court's reception was low in the region, the intervention was symbolic on the administration of justice, sets precedent, and points to futuristic visions of treating humanity (Interview, Gulu, Uganda, 23 March 2016).

Likewise, Regan Okumu, an Acholi MP, observed that Ong'wen's trial at The Hague "was a blessing in disguise" (cited in Branch 2017, 47). According to Okumu, the future would only be shaped by the past, as the issue of northern Uganda largely remained unresolved by state authorities (ibid, 48). As Okumu further posited, notwithstanding the ICC's single focus on the LRA, the trials could open up the avenues of justice by bringing to the fore the regime's alleged crimes (ibid, 48).

In addition, a prominent Acholi politician who was initially opposed to the ICC's intervention nodded to the Court's significant role in combating impunity. While contesting the ICC's intervention in Uganda at the height of the northern conflict, he rebutted Amnesty International's support for the Court as "smacking of arrogance and conceit ... based on shaky legal grounds" (Mao, 2008b). Subsequently, he enlisted Spain, Chile and Rwanda as world examples of "indigenous justice and reconciliation processes," which the former UN Secretary General had also endorsed (ibid, 1). However, in the later phase of the conflict, he narrated how, "the ICC's shadow around the Juba process also made them to re-examine domestic systems ... Africa's domestic systems are still drastically wanting" (Mao 2013, 1). He also postulated that the ICC's precedent of pursuing sitting heads of states position it as the only institution that can remind masterminds of impunity of their impending prosecutions (ibid, 1).

Besides, the ICC seems to enjoy relative acceptance from some of Uganda's authorities, regardless of Museveni's recent outbursts. Towards this end, Uganda has not taken any active steps to withdraw from the Rome Statute, despite several threats to do so. In an address to parliament in April 2017, Uganda's AG noted that they had not sent a notification on withdrawal from the ICC, and that such an "allegation is based on conjecture" (cited in Imaka 2017, 1). The AG further confirmed Uganda's continued cooperation with the ICC in the face of Africa's intentions on collective withdrawal.

According to an official in the Ministry of Justice, the ICC is an avenue of accountability from a functional point of view, and only when it veers off from known norms of justice can the question of a withdrawal be relevant (Interview, Kampala, Uganda, 3 February 2016). As the official further noted, "the dissenting voices from



the AU is all about choice of geographical region of cases, hence, there needs to be juxtaposition with ignored cases” (ibid). Thus, the concerns on an African bias is “a viable debate and should be treated at technical levels and pragmatic global levels in equal application” (ibid).

In Kenya as well, the ICC is relatively accepted, including from some of its harshest critics and opponents in the Jubilee Alliance. Despite the country’s reform trajectory after the 2007/2008 PEV, not much has changed as far as political mobilization is concerned. As a veteran Kenyan politician described the Jubilee Alliance and its CORD contemporary, “they are ethnic and therefore think, organize, vote and act ethnic in every other manner” (Wamwere 2016, 1). Moreover, the coalitions are “ethnic armies that are made purposely to defeat ethnic enemies with either the ballot or bullets” (ibid, 1).

More so, towards the August 2017 elections, the government declared some parts of the Rift Valley, Coast, Nairobi, Kiambu and Kisumu as potential violence hotspots (Oduor and Oluoch, 2017; Oloo, 2017). Hence, security agencies made sustained efforts to contain the negative peace before the identified areas degenerated into overt violence (ibid).

Perhaps, aware of the country’s political trends, the Jubilee Alliance did not take any proactive steps in withdrawing Kenya from the ICC, despite their reservations on the institution, commanding vote in the National Assembly, and three withdrawal motions. As a Jubilee Alliance MP stated, Kenya should not withdraw from the ICC due to the possibility of violence (cited in Wanyoro 2016, 1). Also, the MP noted that the

2007/2008 PEV was a reality that Kenyans should not forget, even with the collapse of the ICC cases (ibid).

Similarly, the former Governor of Kiambu County where Kenyatta hails from opined that it is unnecessary to withdraw from the ICC due to the Court's critical role in achieving justice by "putting dictators in check" (cited in Maichuihe 2017, 1). For his part, a Kikuyu politician who has since been elected into parliament likened the ICC to domestic institutions, such as Kenyan laws and the Ethics and Anti-Corruption Commission (EACC) that play important roles; although they are unable to combat corruption (Interview, Nairobi, Kenya, 9 February 2016).

A senior official in the Jubilee administration summed up their acceptance of the ICC by revealing how, at a closed-door meeting with some MPs who were vocal in anti-ICC bashing, candidly talked about the utility of such an international process (Interview, Nairobi, Kenya, 21 November 2015). Additionally, the official argued that their problem with the Court was the conduct of the cases, of which withdrawal will not be an appropriate remedy (ibid). As the official concluded, "there is room for international justice ... the reality is that we will never go back to a situation where there is no international justice" (ibid).

Besides the Jubilee Alliance's appreciation of the ICC, the options of withdrawing Kenya from the Rome Statute would be an unpopular decision in the country. Besides the backing from some Jubilee Alliance politicians, the ICC has a considerable domestic support base. These include several governance and human rights activists, and the Jubilee Alliance's political opponents, who transformed from CORD to the National Super Alliance (NASA). At a public gathering in December 2016, NASA's

leader, Odinga, reiterated their support for the ICC and rejected any intentions of withdrawing Kenya from the Court (Guleid, 2016).

Moreover, some members of the Kikuyu and Kalenjin communities also believe in the ICC's utility. A Kikuyu interviewee who was critical of the ICC observed that he accepts the Court because of Kenya's elusive justice, and that apart from Kenyatta's predicaments, the Kikuyu have no problem with the Court (Interview, Nairobi, Kenya, 2 March 2016). Likewise, a Kalenjin politician noted how "they initially opted for The Hague because they wanted something that would not be subjected to manipulation ... they have no faith in own courts" (Interview, Nairobi, Kenya, 12 April 2016).

A Kikuyu youth also revealed that the same people who rejected the ICC think that the community might use the Court's threat as a deterrent to violence in the future (Interview, Nairobi, Kenya, 02 March 2016). Already, during the 2017 electioneering period, the Jubilee Alliance leadership threatened Odinga with the ICC's prosecution in case he caused violence (Rono, 2017). Seemingly, in the long-run, the ICC's reception in Kenya will border on support, pragmatic use, and active politicization of its intervention.

To some extent, the ICC's relative acceptance in local and regional African realms is lent credence by the inadequacies of the much talked about alternative to international criminal adjudication – the ACJHR. Evidently, the ACJHR's operationalization is slowed down by the apparent lack of the requisite political will from African member states. At the 28th Ordinary Session of the Assembly of the AU in January 2017, the regional body expressed its reservations at slow signing of the Protocol that made

changes to the ACJHR (AU 2017b, 1). Therefore, the AU reiterated its previous call on Member States ratify the Protocol immediately (ibid, 1).

Some of the continent's top judges commented on the ACJHR's viability vis-à-vis political will at the side-lines of a 2017 Kigali summit on collaboration for access to justice. Collectively, the chief justices from Sierra Leone, South Africa and Rwanda agreed that Africa has the capacity to create its own tribunal to replace the ICC, but only with the necessary political will (Kuteesa, 2017).

For example, the South African chief justice, Mogoeng, posed whether Africa has the willpower to pursue all accused without resorting to all sorts of political and diplomatic language to shield suspects (ibid). Turning to Africa's history, Mogoeng doubted whether Africans have the willpower or not, and insisted on settling the question first, lets people will be killed, followed by inaction due to diplomatic and political arrangements to frustrate justice (ibid).

Besides, the ACJHR has provisions on immunity for sitting heads of states. Unlike the ICC's precedents of zero tolerance for impunity, the African alternative gives incentives for the powerful to commit atrocities, with assured impunity. The ACJHR's immunity clause bodes well with the recent prosecution of former Chadian dictator, Hissen Habre, in Senegal, through an AU sanctioned process, long after Habre relinquished state authority.

The absence of viable regional alternatives to the ICC, coupled with domestic inability and or/unwillingness to prosecute the power elite for mass crimes in many African states, promote the Court's acceptance in many African spaces. This is despite criticisms of an African bias that propels the Court's resistance on the continent. Some

commentators even suggest that the ICC's focus on the continent means that Africans are making use of the Court they were instrumental in creating (see for example Annan, 2016). According to this strand of argument, it is suggested that six African states made use of self-referral, African states voted in favour of the UNSC's referrals of Libya and Sudan, and the ICC's *proprio motu* intervention in Kenya was supported enthusiastically by the majority of the population (ibid). For some observers, an African focus means that many of the continent's victims of mass atrocities have more access to justice than ever before (Human Rights Watch, 2016).

To date, many African countries have rescinded their intentions of withdrawing from the Rome Statute, including Kenya, which sponsored the motion and debates on collective action in the AU. It was only The Gambia, South Africa and Burundi that formally wrote to the UN on their intentions to leave the ICC in 2016. Nonetheless, The Gambia and South Africa rescinded their decisions on withdrawal, leaving Burundi as an outlier in departing from the ICC.

The Gambian decision followed the election of a new president, Adama Barrow, on a platform of institutional reforms and restoration of international cooperation (New African, 2017). South Africa withdrew its withdrawal notice (UN, 2017d) following a domestic court ruling in February 2017 that decried lack of parliament's participation in the process (Tandwa, 2017). Despite speculations and their majority in the National Assembly, the ruling Africa National Congress (ANC) party did not contest the Democratic Alliance (DA) sponsored court process. Instead, the Minister for Justice withdrew a Bill that sought to initiate formal proceedings for South Africa to leave the ICC (Mkhwanazi, 2017).

During a November 2016 ASP meeting, many African states, including Nigeria, Ghana, the DRC, Côte d'Ivoire, Botswana, Mali, Burkina Faso, Tanzania and Lesotho, renewed their commitment to the ICC (Keppler 2016, 1). In addition, at the AU ordinary session in January 2017, Cape Verde, Nigeria and Senegal entered their reservations on the regional body's decisions on the ICC, including the AU's withdrawal strategy. Furthermore, Malawi, Tanzania, Tunisia and Zambia requested more time to study the withdrawal strategy, whereas Liberia entered its reservation on paragraph 8 of the decision (AU 2017b, 3). The majority of Zambians also rejected calls for withdrawal from the ICC after the question was put to a referendum by the ruling party in 2016 (Zambian Watchdog, 2016).

After the rescissions on collective withdrawal from the ICC, including from some of the decision's pioneers, Africa reverted to its earlier accommodation of ICJ. Consequently, these developments speak to the notion that the continent's collective withdrawal strategies were exchanges with the ICC, and not its rejection in entirety. This positions the AU's rejection of the Court as part of pragmatic politics, and not on ideals.

### **Africa's withdrawal strategies as exchanges with the ICC**

Africa's inability to establish a viable regional alternative to the ICC and the Court's capability to punish the power elite relegate the much-touted African mass withdrawal to the AU's articulation of its peripheral location in the global political economy, and a need to assert herself in the global order, including on ICJ. This premise is expounded in the AU's draft withdrawal document, in which the regional body backtracks on

collective withdrawal from the Rome Statute, and points out Africa's misgivings in the ICJ infrastructure, and thereafter, proposes a raft of reforms to the ICC.

The draft withdrawal document begins with the AU's narration of historical and contextual backgrounds on the commission of atrocities, and the continent's initial enthusiasm for the ICC. As such, the regional body points out that the original 34 African states that signed the ICC treaty in 1998 accepted the rule of law crusade as part of their pursuit of Africa's liberation from preceding episodes of injustice that accrued from regional conflicts and Western imperialism (AU 2017a, 1).

Departing from the initial passion for the ICC, the AU registered its misgivings on the Court's selective focus on the continent. In so doing, the AU lamented about the ICC's perceived selectivity as exhibited in the prevalence of African suspects of ICJ, as well as suspicions on prosecutorial discretion (AU 2017a, 1). In addition, the AU decried the inequity in the global system of making decisions, whose prevalent politics produce imbalances in the rule of law application (ibid, 1).

Principally, the AU pointed to the UNSC system, in which P-5 members make decisions based on political considerations, as opposed to the interest of justice and law. According to the AU, some of those interests are not shared among Africans, besides the fact that the council makes legally binding decisions on an institution that most of them have little regard for (AU, 2017a).

Having expounded Africa's peripheral location in the ICJ system and global political decision making, the AU outlined various measures in asserting the continent's rightful place in the international (criminal justice) order. This culminated in the AU's collective strategy that was steered by the Open Ended Ministerial Committee. The

committee outlined a number of objectives, including: (1) working towards the fair and transparent conduct of international justice and eliminating perceptions of double standards; (2) commencing legal and administrative reforms of the ICC; (3) regionalizing international criminal law; and (4) encouraging the adoption of African solutions for African problems or preserving the dignity, sovereignty and integrity of African states (AU 2017a, 2).

The AU's collective withdrawal strategy was justified under the rationale that a treaty's denunciation by a few member states might signal a departure from "an old equilibrium" that suits some countries to others' disadvantage, to "a new equilibrium" that comes with far-reaching results (Helfer 2005, 1646). Building on Helfer's arguments, the Ministerial Committee further argued that, states can unite in order to contest and rebuke international legal rules and institutions that they perceive as unjust, (Helfer, cited in AU 2017a, 6).

Consequently, for the AU, collective action would potentially alter the existing shape of ICJ. In this vein, the AU cited the contemplation that treaty withdrawal give critical states voice by elevating their leverage to restructure the treaty in line with their interests, or by creating a competing institution altogether (Helfer 2005, 1588).

Predicating the collective withdrawal strategy on the slow progress of amending the Rome Statute as some members states had earlier proposed, the AU suggested a raft of measures to assert Africa's position in the ICJ system. These consisted of: strengthening national and regional ICJ systems for African ownership; engaging with the UNSC and assertions that referrals must seek the AU's consent; ratification of the



Malabo Protocol that expanded the jurisdiction of the ACJHR; and conditions and timelines for withdrawal from the Rome Statute (AU 2017a, 7).

Ultimately, the AU's threat of withdrawal was conceived as a strategy to engage with the ICJ system. This was envisaged on two broad approaches: legal and institutional strategies, as well as political engagements and strategies (ibid, 7). The two methods were employed against the backdrop of the mantra of African solutions to African problems.

With regards to legal and institutional strategies, some AU member states, notably Kenya and South Africa, proposed amendments to the Rome Statute that the regional body endorsed. As the AU (ibid, 8) reveals, African ICC member states agreed in November 2009, under South Africa's leadership, to propose amendments to Article 16 as redress to the UNSC's inability to decide on deferral requests. The proposals included the transfer of such requests to the UN General Assembly for decision and adoption.

For its part, Kenya proposed a range of reforms in the Rome Statute, including changes to the preambular to read that "the ICC ... shall be complementary to national and regional criminal jurisdictions" (ibid, 9). The amendment was subsequently welcomed by the AU as aligned to its resolutions and acknowledgement of regional judicial frameworks (ibid, 9). Kenya also anticipated changes to Article 63 (2), that envisages a trial in the absence of the accused in exceptional circumstances. According to Kenya, the term "exceptional circumstances" is not adequately defined in the Statute and there are no case laws to guide the Court on the same (ibid, 9).

Kenya also proposed amendments to Article 27 on “irrelevance of official capacity.” In Kenya’s wisdom, heads of states and governments should be insulated from prosecution until termination of their official capacities (ibid). This, Kenya argued, was in line with domestic and customary international law (ibid). Moreover, Kenya anticipated changes to Article 70 on the offences against the administration of justice. According to Kenya’s interpretation, the “article presumes that such offences save for 70(1) (f) can be committed only against the Court” (ibid). Hence, Kenya argued, the article ought to be amended to include the Court’s offences. Finally, Kenya proposed that an Independent Oversight Mechanism (IOM) be created to inspect, evaluate and investigate all the ICC’s organs. As Kenya envisaged, the IOM would ensure the Court’s efficiency, economy and checks against the OTP’s excesses (ibid).

Besides the proposed amendments, the AU sought reform of the UNSC, whose power it considers contentious as non-signatories to the Rome Statute have powers to refer situations to the ICC (AU 2017a, 11). Additionally, the AU sought to increase Africa’s representation in the Court in order to enhance the continent’s contribution to its jurisprudence (ibid, 12). This included suggestions that as the ICC’s largest regional block, the Court’s staffing should equally be skewed towards Africa (ibid).

The AU also suggested a need for strengthening national legal and adjudicative mechanisms in order to reduce the prospects of the ICC’s interventions on the continent (ibid). Towards this end, the AU advocated for ratification of the protocol on amendments to ACJHR. This would enhance the principle of complementarity and reduce reliance on the ICC in furtherance of “African solution to African problems” (ibid, 12).

Amongst the AU's political solutions were recommendations that the body engages with relevant actors in the ICC processes, with identifiable issues and expected outcomes. For the UNSC, the AU noted some core issues, such as: suspension/deferral/withdrawal of Bashir's indictment, inclusion of the AU's opinion on future referrals, and acknowledgement of continental solutions/mechanisms (ibid, 13).

To the ASP, the AU identified pending proposed amendments to the Rome Statute; reduction of the OTP's powers; a need to recognize the interconnectedness between peace and justice, and exemption of the ICC's arrest warrants in UN mandated peacekeeping operations (ibid). For these issues, the AU pegged conditions of non-withdrawal on the reforms they proposed and a need to agree on their timelines.

Further, the AU identified the P-5 UNSC members, whose engagements would be needed in appreciating Africa's and regional mechanisms in resolving issues and securing their support in international endeavours. The AU expected the UNSC's assurances on vetos on request for deferral of proceedings against Sudan's Bashir. The AU identified China and Russia as some of the UNSC members who have previously supported their resolutions. For the African groups in New York and The Hague, the AU expected them to ensure African solidarity and facilitate the endorsement of the proposed amendments. Additionally, the AU designated to engage the ASP president in all issues and counted on him to advance its positions in the ASP (ibid).

Therefore, the ICC withdrawal strategy emerged as the AU's carrot and stick in pushing for moderation of the Court's activities on the continent, and articulating Africa's position in the unequal international (criminal justice) system. On the one hand, the

AU suggests a need for Africa's withdrawal and on the other, it recommends corrections in the ICJ system.

For instance, the AU commended The Gambia's, South Africa's and Burundi's withdrawal efforts as pioneers in the anti-ICC strategy. Also, the AU requested the Open Ended Ministerial Committee to provide feedback on the withdrawal endeavours during the forthcoming July 2017 session of the AU (AU 2017b, 3). Conversely, the AU also appreciated the ASP President's initiation of constructive exchanges on the continents' issues, and argued it was a precursor for future dialogue, including on the nexus between peace and justice (ibid, 3).

Given the apparent African exchanges on the ICC and recessions on collective withdrawal, the main challenge that lays ahead of the Court is how to universalise justice. Perhaps, the universality of the ICC's justice would reduce incentives for the construction of narratives on its interventions, such as selectivity and neo-colonialism. Indeed, and as Bassiouni (2003,70) rightly notes, ICJ must be universalized owing to its realization of principles and policies that are important for the attainment of peace, given the increasing "xenophobic nationalism" and restatement of state sovereignty.

In the present era, no domestic or regional institution has the relative reach, acceptance, and normative imperatives that the ICC possess. Cody.et.al. (2015, 59) opine that despite the ICC's susceptibility to political influence, it is better placed to mete justice at a greater scale than local or regional judicial mechanisms. With the constant commission of atrocities globally, safeguarding the principle of holding perpetrators to account calls for considerations for the scope and type of justice the ICC dispenses, the

politics involved in its operations, and readiness to tackle the concerns on the Court (Bluen 2017, 1).

However, the heterogeneity of actors and institutions that the ICC interacts with in the events of its interventions still poses the risk of contextual normative adaptations. The ICC will thus endure to face adversaries in its attempts to universalize justice in diverse sub-national, national and regional spaces.

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## **Appendix.**

### **List of Interviews.**

1. Journalist, RNW and France 24, Delft, The Netherlands, 6 October 2015.



2. Journalist, Amsterdam, The Netherlands, 9 July 2015.
3. Editor, Justice Hub, Justice Tribune and HagueTrialsKE, The Hague, The Netherlands, 10 July 2015.
4. Official, Association of Journalists at the International Criminal Court (AJICC), The Hague, The Netherlands, 13 July 2015.
5. Journalist, Le Monde, The Hague, The Netherlands, 16 October 2015.
6. Official, The International Criminal Court (ICC), The Hague, The Netherlands, 22 July 2015.
7. Official, Coalition for the International Criminal Court (CICC), The Hague, The Netherlands, 23 July 2015.
8. Representative, International Federation for Human Rights (FIDH), The Hague, The Netherlands, 24 July 2015.
9. Regional Director for Eastern Africa and the Great Lakes Region, Nairobi, Kenya, 13 August 2015.
10. Programme Officer, Kenya Section of the International Commission of Jurists (ICJ), Nairobi, Kenya, 20 August 2015; 18 February, 2016.
11. Human rights activist, Nairobi, Kenya, 19 August 2015.
12. Senior Lecturer, Department of History and Political Studies, Kenyatta University, Nairobi, Kenya, 26 August 2015.
13. Official, Journalist for Justice (JF) and former Judiciary and KPTJ official, Nairobi, Kenya, 22 September 2015; 8 February 2016.
14. Official, Coalition for Reforms and Democracy (CORD), Nairobi, Kenya, 28 September 2015.

15. Jubilee Alliance activist, Nairobi, Kenya, 25 September 2015; 17 February 2016.
16. Orange Democratic Movement (ODM) politician, Nairobi, Kenya, 23 September 2015.
17. Jubilee Alliance politician, Nairobi, Kenya, 23 September 2015; 29 February 2016.
18. Journalist, Nation Media Group, Nairobi, Kenya, 29 September 2015.
19. Kalenjin youth and politician, Nairobi, Kenya, 22 September 2015; 17 February 2016.
20. Official, CORD, Nairobi, Kenya, 1 October 2015; 15 February 2016.
21. Kalenjin youth, Nairobi, Kenya, 2 October 2015.
22. Human rights activist, International Center for Transitional Justice (ICTJ), Nairobi, Kenya, 7 October 2015; 13 February 2016.
23. Human rights activist, International Center for Policy and conflict (ICP), Nairobi, Kenya, 8 October 2015.
24. Human rights activist, KPTJ, Nairobi, Kenya, 9 October 2015.
25. Researcher, IPSOS Synovate, Nairobi, Kenya, 12 October 2015.
26. Head of Office, international organization, Nairobi, Kenya, 16 October 2015.
27. Former ODM youth official, Nairobi, Kenya, 15 October 2015.
28. Kalenjin youth and politician, Nairobi, Kenya, 15 October 2015.
29. Peace activist, Peace and Development Network Trust (PeaceNet - Kenya), Nairobi, Kenya, 27 October 2015.
30. Peace activist, PeaceNet-Kenya, Nakuru, Kenya, 2 November 2015.

31. Peace activist, Free Pentecostal Fellowship Kenya peace project, Nakuru, Kenya, 2 November 2015.
32. Community leader and peace-building practitioner, Eldoret, Kenya, 3 November 2015.
33. Peace activist, PeaceNet (North Rift Region), Eldoret, Kenya, 3 November 2015.
34. Human rights activist, Center for Human Rights and Democracy, Eldoret, Kenya, 4 November 2015.
35. Official, Civil Society Organization (CSO) Network, Kisumu, Kenya, 5 November 2015.
36. Official, InformAction, Kisumu, Kenya, 5 November 2017.
37. Former ODM official, Kisumu Town West Branch, Kisumu, Kenya, 5 November 2015.
38. Senior government official, Nairobi, Kenya, 21 November 2015.
39. Kikuyu youth, Kiambu, Kenya, 30 November 2015.
40. Teacher, Kiambu, Kenya, 30 November 2015.
41. Jubilee Alliance politician, Nairobi, 9 February 2016.
42. Human rights activist, Kituo cha Sheria, Nairobi, Kenya, 2 March 2016.
43. Trial Monitor, International Justice Monitor, Nairobi, Kenya, 16 February 2016.
44. Kalenjin youth, Nairobi, Kenya, 23 February 2016.
45. Peace activist, Catholic Justice and Peace Commission (CJPC), Nakuru, Kenya, 23 February 2016.

46. Kikuyu youth, Nairobi, Kenya, 2 March 2016.
47. Lawyer, Nairobi, Kenya, 11 March 2016.
48. Kalenjin politician, Nairobi, Kenya, 12 April 2016.
49. Official, PeaceNet Kenya, Nairobi, Kenya, 18 April 2016.
50. Religious leader, Catholic Church, Bomet, Kenya, 12 March 2016.
51. Kikuyu youth, Nairobi, Kenya, 2 March 2016.
52. Kikuyu elder, Kiambu, Kenya, 29 February 2016.
53. ODM youth leader, Kisumu Central Constituency, Kisumu, Kenya, 09 March 2016.
54. ODM youth leader, Kitutu Masaba Constituency, Nairobi, Kenya, 19 April 2016.
55. Lawyer, Kampala, Uganda, 15 December 2015.
56. Former Senior NRM official, Kampala, Uganda, 16 December 2015.
57. Professor, Makerere University, Kampala, Uganda, 13 January 2016.
58. Buganda researcher, Kampala, Uganda, 25 January 2016.
59. Researcher, Refugee Law Project, Kampala, Uganda, 27 January 2016.
60. Human rights activist, Refugee Law Project, Kampala, Uganda, 27 January 2016.
61. Former official, CICC, Kampala, Uganda, 27 January 2016.
62. Acholi native, Kampala, Uganda, 28 January 2016.
63. Lawyer, Kampala, Uganda, 29 January 2016.
64. Official, ICC, Kampala, Uganda, 30 January 2016.
65. Official, ICC, Kampala, Uganda, 2 February 2016.

66. Official, ICC, Kampala, Uganda, 2 February 2016.
67. Lawyer and human rights activist, Kampala, Uganda, 2 February 2016.
68. Human rights activist, Kampala, Uganda, 3 February 2016.
69. Official, Ministry of Justice (JLOS), Kampala, Uganda, 3 February 2016.
70. Lecturer, Makerere University, Peace and Conflict Studies Programme, Kampala, Uganda, 3 February 2016.
71. Human rights activist, Human Rights Network (HURINET), Kampala, Uganda, 4 February 2016.
72. Official, Ministry of Justice (JLOS), Kampala, Uganda, 4 February 2016.
73. Senior official, Amnesty Commission, Kampala, Uganda, 5 February 2016.
74. Acholi religious leader, Gulu, Uganda, 21 March 2016.
75. Acholi religious and cultural leader, Gulu, Uganda, 22 March 2016.
76. Elected representative, Gulu District, Gulu, Uganda, 23 March 2016.
77. Human rights activist, Refugee Law Project, Gulu, Uganda, 24 March 2016.
78. Acholi religious and cultural leader, Gulu, Uganda, 25 March 2016.
79. Acholi religious leader, Gulu, Uganda, 30 March 2016.
80. Human rights activist, Foundation for Justice and Development Initiative (FJDI), Gulu, Uganda, 30 March 2016.
81. Official, Office of the Director of Public Prosecutions, Kampala, Uganda, 31 March 2016.

